Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

Mark Boivin, – Petitioner

v.

Town of Addison – Respondent

ON PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Vermont

PETITION FOR WRIT OF CERTIORARI

Mark A. Boivin – pro-se
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Addison, Vermont 05491
(802) 475-2494

QUESTION(S) PRESENTED

1. Whether the Town may use differential assessments for ad valorem taxation of real property, including the reassessment ex post facto of only those properties that have sold and were chosen for inclusion in the State's tax equalization study, in order to acquire an interest in the properties of a particular class.

2. Whether the application of a pre-qualifying test of licensure to determine the credibility of the landowner and the subsequent application of a double standard of review to the evidence based upon this criteria, meet the requirements of due process and equal protection.

LIST OF PARTIES

Additional parties that do not appear in the caption of the case on the cover page are as follows:

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In The

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Entry Order of the Supreme Court of the State of Vermont, the highest state court to review the merits, is not reported and appears at Appendix A to this petition on page 31.

The Ruling on Tax Appeals of the State of Vermont, Addison County Superior Court, the trial court, is not reported and appears at Appendix B to this petition on page 40

JURISDICTION

The date on which the Supreme Court of the State of Vermont, the highest state court decided this case, was December 4, 2003. A copy of that Entry Order appears at Appendix A on page 31

No petition for rehearing was filed.

No extension of time to file was sought.

The Jurisdiction of this Court is invoked under 28 U.S.C. §1257(a)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions:

The Fifth Amendment to the United States Constitution provides in relevant part: "[N]or shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of thelaws."

The Constitution of the State of Vermont

Chapter I., A Declaration of the Rights of the Inhabitants of the State of Vermont.

Article 2. [Private property subject to public use; owner to be paid]

That private property ought to be subservient to public uses when necessity requires it, nevertheless, whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money.

Article 4. [Remedy at law secured to all]

Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which one may receive in person, property or character; every person ought to obtain right and justice, freely, and without being obliged to purchase it; completely and without any denial; promptly and without delay; comformably to the laws.

Article 9. [Citizens' rights and duties in the state; bear-

ing arms; taxation]

That every member of society hath a right to be protected in the enjoyment of life, liberty, and property, and therefore is bound to contribute the member's proportion towards the expence of that protection, and yield personal service, when necessary, or an equivalent thereto, but no part of any person's property can be justly taken, or applied to public uses, without the person's own consent, or that of the Representative Body, nor can any person who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if such person will pay such equivalent; nor are the people bound by any law but such as they have in like manner assented to, for their common good: and previous to any law being made to raise a tax, the purpose for which it is to be raised ought to appear evident to the Legislature to be of more service to community than the money would be if not collected.

Statutory Provisions:

26 V.S.A. § 3323(a)(7)

(a) The following conduct by a licensee and the conduct set forth in section 129a of Title 3 constitute unprofessional conduct....

(7) Violating the confidential nature of governmental records to which the licensee gained access through employment or engagement as an appraiser by a governmental agency.

32 V.S.A. § 3757(a)

"(a) Land which has been classified as agricultural land or managed forest land pursuant to this chapter shall be subject to a land use change tax upon the development of that land, as defined in section 3752 of this chapter. Said tax shall be at the rate of 20 percent of the full fair market value of the changed land determined without regard to he use value appraisal...."

32 V.S.A. § 3757(f)

"(f) The application for use value appraisal of agricultural and forest land, once approved by the state, shall be recorded in the land records of the municipality and shall constitute a lien to secure payment of the land use change tax to the municipality upon development. The landowner shall bear the recording cost. The lad use change tax and any obligation torepay benefits paid in error shall not constitute a personal debt of the person liable to pay the same, but shall constitute a lien which shall run with the land."

32 V.S.A. § 3802 (2003). Property tax

The following property shall be exempt from taxation:

(8) Household furniture and equipment of every person not regularly used as income producing property; household provisions; personal wearing apparel and ornament; private and professional libraries; shrubs and plants located in a commercial greenhouse or nursery; fowl; sheep; cattle; horses; goats; swine; bees; hay and produce sufficient to winter out the stock; tractors and other machinery of a farmer, not used for hire or contract purposes; real and personal farm property constructed and used for the storage of manure and designed to avoid water pollution; tools and implements of a mechanic or farmer; aircraft, automobiles and motor vehicles, but not including trailer coaches; and motorized highway-building equipment and road-making appliances as defined in section 4(19) and (31) of Title 23 required to be registered as motor vehicles;

Rules:

USPAP Standards Rule 1-2(e)(iii)

"(e) identify the characteristic of the property that are relevant to the purpose and intended us of the appraisal,[9] including:...

(iii) any personal property, trade fixtures, or intangible items that are not real property but are included in the appraisal;"

USPAP Standards Rule 1-4(g)

"(g) An appraiser must analyze the effect on value of any personal property, trade fixtures, or intangible items that are not real property but are included in the appraisal

Comment: Competency in personal property appraisal (see STANDARD 7) or business valuation (see STANDARD 9) may be required when it is necessary to allocate the overall value to the property components. A separate valuation, developed in compliance with the Standard pertinent to the type of property, is required when the value of a nonrealty item or combination of such items is significant to the overall value."

STATEMENT OF THE CASE

This petition is to determine if the Petitioner can legally be required to choose between being taxed at more than 1½ times the value of his property or, as the alternative, to grant a lien in perpetuity to the municipality equivalent to 1/5 of its value. Whether properties in a particular class, those eligible for a State tax abatement program, can be assessed on the basis of "going concerns" including items of personality exempted by statute, while other properties are assessed only upon the value of the real estate. Whether the use of "sales chasing", the practice of reassessing only the properties selected for the State's equalization study after their sale and before inclusion in the study; thus concealing the differential taxation, also violated the constitutional rights of the Petitioner.

Federal importance:

The issue of federal importance is whether a taxing jurisdiction may use selective reassessments and differential taxation to obtain, without compensation, an interest in private property or are such schemes violations of the due process, equal protection and compensation clauses of the Constitutions.

The disparity in taxation is masked by sales chasing, where only the properties that were chosen for the State's equalization study[1] were selected and reassessed ex post

[1] The equalization study is a ratio study of sale prices to listed values used to determine the uniformity and equity of tax assessments. Nationally every state plus the District of Columbia perform an equalization study. Only ten have a law prohibiting sales chasing. Vermont does not. The states that prohibit sales chasing are: Colorado, Maryland, Massachusetts, Minnesota, Montana, No. Carolina, Texas, Utah, West Virginia, and Wyoming.

facto of the sale. The new assessments were then included in the equalization study thus concealing the lack of uniformity and or equity in the taxation. This Court has unanimously ruled that this practice violated the Fourteenth Amendment to the Constitution in Allegheny Pittsburgh Coal v. Webster County, 488U.S. 336(1989). When the corrupted study was presented and accepted as evidence of compliance with the requirements of taxation, the Petitioner's due process rights under the Constitution were abrogated.

In addition the trial court applied a double standard to the evidence presented. All of the evidence presented by the landowner was deemed not credible because "Mr. Boivin is a dairy farmer not an appraiser." and that "...[H]e did not use standard appraisal methods in selecting or comparing them to the parcels at issue." Despite numerous errors, including the use of circular reasoning, the trial court accepted without question the testimony of the Town's witness Mr. Justus DeVries because he is a licensed appraiser. When it was demonstrated that Mr. Devries violated the Uniform Standards of Professional Appraisal Practice (USPAP), the Vermont Supreme Court stated, "In other words, unless the law requires the court to rely upon those standards, its failure to do so is not reversible error."

This Court has ruled that intentional, systematic, differential appraisal of property for taxation violates the equal protection clause of the Constitution. When this differential taxation results in properties being taxed for more than they are worth, and when the taxpayer given the choice of paying the tax or giving up 1/5th of his property to the Town, then there is also a violation of the compensation clause of the Constitution. Application of a double standard of comparison to the evidence, based upon who has bought a license from the state is a violation, of the due process protections of the Constitution.

The issues of differential taxation, sales chasing, and

the acquisition of private property for conservation purposes are of national significance. When these issues converge as they have here with taxation being used to acquire private property for conservation purposed the result is major violation of constitutional protections.

Background

The State of Vermont, like many other states, has implemented a current use value appraisal program (henceforth, "Current Use Value or CUV") for the taxation of agricultural properties. Its purpose is in 32 V.S.A. § 3751

"The purpose of this subchapter is to encourage and assist the maintenance of Vermont's productive agricultural and forest land; to encourage and assist in their conservation and preservation for future productive use and for the protection of natural ecological systems; to prevent the accelerated conversion of these lands to more intensive use by the pressure of property taxation for undeveloped lands; to achieve more equitable taxation for undeveloped lands; to encourage and assist in the preservation and enhancement of Vermont's scenic natural resources; and to enable the citizens of Vermont to plan its orderly growth in the face of increasing development pressures in the interest of the public health, safety and welfare." (Emphasis added)

The CUV is developed annually by the State of Vermont using the discounted cash flow method of appraisal. The State uses actual financial data for farms in Vermont that it obtains from the Farm Credit System, a nationally chartered agricultural bank. The value for each farm enrolled is published annually and is available to the public. Under the CUV Program the State reimburses the municipalities the taxes on the difference between the listed values and the CUV of all the parcels enrolled in the program. This reimbursement to the municipalities of revenues lost due to the program protects other taxpayers, e.g.

homeowners, from having to bear a disproportionate burden.

Annually the Vermont Department of Taxes, Division of Property Taxation and Review (henceforth PVR) conducts a statistical comparison between the listed values and the sale prices of properties that sell in each town. This is called the Equalization Study. This study is used to determine if local listed values conform to the constitutional and statutory requirements of uniformity and equity. The State also depends upon this study to identify over-assessments for the Current Use Program.

While other states with similar programs also include a penalty for persons withdrawing from their programs; Vermont is unique in the severity and duration of the penalty. For example Ohio has a CUV appraisal program that requires anyone that withdraws from it to reimburse the state for the benefits acquired during the previous three years. On the other hand, Vermont assesses a "land use change tax" of $1/5^{th}$ of the value of the property at the time of withdrawal, which is secured by a lien that runs with the land in perpetuity. See 32 V.S.A. §3757(a) & 32 V.S.A. §3757(f). This "land use change tax" is remitted to the town when collected.

Chronology of the case

In 1996 the Town of Addison conducted a complete reassessment of the real property in town for the grand list.

At the same time the State changed the penalties for enrollment in the CUV program from a re-imbursement of benefits to a "land use change tax" secured by a lien on the land. This tax was originally at 10% of the value and was later increased to 20%.

Petitioner withdrew from the program claiming that he should not be forced to grant a permanent lien on his property in exchange for taxation at the fair market value of his property.

The 1996 assessment was appealed first to the Addison County Superior Court then to the Vermont Supreme Court. Both appeals were denied because the appellant's appraiser had valued the properties as one continuing enterprise.

After re-hearings before town officials Petitioner filed a new appeal with the Addison County Superior Court on September 8, 2000 for the 2000 tax year.

Depositions were held on March 5, 2002

Trial was held on January 22 and 23, 2003

Trial Court Ruling on Tax Appeal was filed on April 29, 2003.

Notice of appeal to the Vermont Supreme Court was filed on May 19, 2003.

Oral arguments before the Vermont Supreme Court were held on December 3, 2003.

Entry order by the Vermont Supreme Court was filed December 4, 2003

Summary

Petitioner is a dairyman who operates an 85-cow dairy farm with his brother in the Town of Addison, county of Addison, State of Vermont. Said farm consist of 468 acres in three parcels, a 110 year old farmhouse, and a freestall barn with a milking parlor.

They appealed their real estate property tax assessment for the 2000 tax year to the Addison County Superior Court. A trial de novo occurred on January 22 and 23, 2003.

During the trial Petitioner presented evidence of six neighboring comparable farm sales that had occurred, all of which were within sight of his properties. All are real properties valued both by the local listers for the Grand List and by the State of Vermont for the Current Use Value program.

Having inspected each of the farms he valued the

"tools and equipment of a farmer[2]" that were included in the sale and deducted their values from the respective sale. Then, using the procedures adopted by the State of Vermont, Department of Taxes, Division of Property Valuation and Review (henceforth PVR) for use in tax equalization studies, he compared the sale prices first with the listed values of the farms and then with the State's published Current Use Value.

The result proved that the listed values on the grand list for tax assessments were for 155% of the sale prices with a 90% confidence interval of ±30.5%.[3]

A second statistical comparison of the same farm sale prices to their respective CUV showed that the published CUV was 101% ±4.7% of the sale prices. See Appendix C Chart One, Local Area Farm Sales, pg. 56

As a result the Petitioner claimed that his property should be listed in conformity with the CUV because it was the best indicator of value. In addition he claimed

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[2] "Tools and equipment of a farmer" is exempted from property taxation in 32 V.S.A. § 3802(8). "The following property shall be exempt from taxation:... (8) Household furniture and equipment of every person not regularly used as income producing property; household provisions; personal wearing apparel and ornament; private and professional libraries; shrubs and plants located in a commercial greenhouse or nursery; fowl; sheep; cattle; horses; goats; swine; bees; hay and produce sufficient to winter out the stock; tractors and other machinery of a farmer, not used for hire or contract purposes; real and personal farm property constructed and used for the storage of manure and designed to avoid water pollution; tools and implements of a mechanic or farmer; aircraft, automobiles and motor vehicles, but not including trailer coaches; and motorized highway building equipment and road-making appliances as defined in section 4(19) and (31) of title 23 required to be registered as motor vehicles;..." . It is further defined in the PVR Rule 82-1.

[3] The PVR applies these rules to its equalization procedures. First no property is to be assessed at a value greater than 100% of its fair market value. Secondly the equalization study must show that the 90% confidence interval for a class of properties must be no greater than ±10% of the aggregate ratio.

that he has a right to be taxed at no more than the fair market value of his property. He also asserted that he should not be required to enter the CU program with its attendant permanent penalties in order to be taxed at the fair market value of his property. Further evidence and testimony demonstrated the relationship between the public appraisals of properties that had sold in town and the fair market value of the Petitioner's properties.

Additional comparisons and calculations were done to show the relationship of the comparable sales to the value of his properties.

At trial, during both direct testimony and under cross-examination, the Petitioner objected to being forced to choose between being taxed at more than 155% of the fair market value of his property or to enter the Current Use Value program with its penalties.

Powers: "But for allowing for that kind of assessment (Current Use) you enjoy the benefits of that kind of program over a period of time then you pull the property out of the program you pay the penalty. [Is] that fair to say?"

Boivin: "The, ah - I would dispute the benefits because what I am objecting to is being taxed for more than the fair market value. If someone was taxed, listed at the fair market value and they did get any benefit, yes, you would be correct."

Powers: "I understand that argument, but as far as the program works, ah, the penalty, the price that you pay when you take the property out – you pay the land use change tax."

Boivin: "That would be a penalty, yes."

Videotape transcript, State of Vermont, Addison County SS, January 22, 2003 @ 15:34

Citing the PVR "100%" and "90-10" rules he claimed that he had the right to be assessed and taxed for no more than the fair market value of his properties.

The fact that Town is engaged in sales chasing i.e. re-

assessing properties that had sold prior to their inclusion in the State's equalization study was also raised both in direct testimony and in cross-examination.

Petitioner presented evidence in the form of property transfer tax returns and testified that the town was engaged in the illegal practice of sales chasing i.e. the reassessing the farms that it included in the state's equalization study between the time of sale and their inclusion in the ratio study. Documentary evidence provided in the form of Property Transfer Tax Returns for only two farm sales in the study, the Gevry to DuBois and Vanier to Dubois sale. Both prove that the properties were reassessed before their inclusion in the equalization study. Mr. Boivin called the practice no different than "changing the numbers on a lottery ticket after the drawing."

The Town had an opportunity to challenge the evidence and to rebut but chose not to contest the evidence.[4]

This issue was raised again in the appellant's brief and during oral arguments before the Vermont Supreme Court.

The Town presented Mr. Justus DeVries, a licensed real estate appraiser, as its witness. Mr. DeVries presented an appraisal of the subject properties as "a going concern". The comparable sales that he used included in the transaction in addition to the real estate, cattle, growing crops, stored cattle feed, grain, machinery of a farmer, etc. Although he had testified that it was important for an appraiser to separately value the non-realty items, and even though he had completed fee appraisals on two of the farms that he used as comparables and had separately valued the non-realty items, he relied solely upon the values listed on the property transfer tax return even though there gross disparities in values.

In his appraisal Mr. DeVries also used circular reason-

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[4] The Town was first apprised of the issue and presented with documentary proof of sales chasing on March 5, 2002 during deposition of Mark Boivin by the Town of Addison.

ing. He subtracted the values for the comparable sales from his estimate of the Boivin property and then added the difference back to the sale to "prove' his original estimate.

"Defendant's Exhibit 8, Appraisal of No-Mon-Ne Farm Associates, Limited Partnership Properties, page 30

"For all sales in the Land, Farm Buildings and Dwellings categories, the adjustments are direct differences between the contributory value of the subject components and those of the comparable sale as indicated in the reconstructed value allocations previously discussed for each sale.

"Example: Sale #1: The land adjustment was computed as follows:

$251,200 Subject land value allocation
- $370,800 Comparable Sale #1's land value allocation
= -$119,600 Negative adjustment because the comparable is superior in this feature."

The adjustment is then added to the sale price of Comparable Sale #1 to return the original estimate of the Boivin's property. In other words; if A minus B equals C does C plus B prove A?

He also used confidential information that he had obtained in appraisals done for the U.S. Farm Service Agency for his comparison of farms based upon the acreages used for pasture, crop, woodland, and wasteland. This is a violation of 26 V.S.A. §3323(a)(7)

The trial court stating, "Mr. Boivin is a dairy farmer, not an appraiser." found for the Town on all issues. The court ignored the sales chasing, the errors committed by Mr. DeVries.

Petitioner appealed to the Vermont Supreme Court citing a prejudicial pre-qualifying test of licensure, application of a double standard, and numerous violations of equal protection and due process. See Appendix C, Appellants' Brief.

During oral arguments before the Vermont Supreme Court, Petitioner renewed his claim of discrimination. He stated:

"The lower court applied a pre-qualifying test of licensure to the testimony, Quote "Mr. Boivin is a dairy farmer not an appraiser." This is a prejudicial error. It violated the equal protection clause and the remedy at law clause of the Constitution. From this prejudicial error flowed the wholesale and totally uncritical acceptance of the Town's position and rejection of mine."

He also addressed the issue of sales chasing later, stating:

"The Town is also sales chasing. It is reassessing only the properties that are selected for the equalization study and no others.

Sale number four was subject to sales chasing.

Sales number five and six, even though the Town's expert witness said they were arms length transaction did not have their values reduced, nor did any other property in town, and they were excluded from the equalization study."

Justice Dooley recognized that sale prices (the fair market values) are at the CUV and that the listed values are greater, stating:

"Um, I'm not sure that this – I guess I'm having trouble interpreting this. If we want land to stay in farming and, um, and we want, and that is why we have the Current Use Program. Shouldn't the, we want the values to reflect the Current Use Values and the land stays in farm-

ing. That's its value! So that, I'm trying to understand, [why] it's a problem that the Current Use Value and the sale price(s) are so close to each other and why it's a problem that they are lower than the listed value. That is of course what the Current Use Program does." (Emphasis added)

Boivin: "I would have no problem with a reduction from the fair market value for any property going into the Current Use Program. My problem is the fact that we are being over-assessed on the listed value far and above the actual fair market value, which is shown by the sales. (See, Chart One, Local Area Farm Sales, on page 56.)

Now, ah, it should be also noted that."

Justice Dooley: But is it the fair market value at its entire development potential or is it really the value as a farm, as a working farm? Because these are all, ah, properties that were sold as a farm, with personal property, right? With the understanding that they would stay in farming? (Emphasis added)

Boivin: No. These were all arms length transactions. At the time of the sale three of those were not in the current use program. The only one that had development rights sold was number four. What I am saying is that the Town is over-assessing the farmland in the town of Addison and as a result it is collecting more from the State of Vermont in the current use program than, uh, was allowed; than it was entitled to. And this, ah, actually is basically fraud against the state in my opinion.

Clerk: Time had run."

ARGUMENT:

Simply put, the Town of Addison is taxing farms within its jurisdiction as "going concerns," complete with items of personality excluded from taxation by statute, at 155% of their fair market values. On the other hand other properties are assessed on only the real estate at less than their fair market values as shown by the State's equalization study. By this method of differential taxation the Town compels farmers to enroll their properties into the Current Use Program and the Town acquires monies from the State of Vermont that it is not entitled to. In addition the Town acquires a lien on the farms equal to 1/5th of their values. The Town also engages in the unconstitutional practice of "sales chasing;" reassessing only the properties selected for inclusion in the State's equalization study. By sales chasing the Town conceals the fact that it is perpetrating a fraud against the state and extorting property from its disadvantaged farmers.

These practices violate the equal protection, due process, and compensation clauses of both the U.S. Constitution and of the Vermont Constitution.

The Vermont Constitution, Chapter One, Article 9th is known as the proportional contribution clause. It guarantees in part:

"That every member of society hath a right to be protected in the enjoyment of life, liberty, and property, and therefore is bound to contribute the member's proportion towards the expense of that protection, and yield personal service, when necessary, or an equivalent thereto, but no part of any person's property can be justly taken, or applied to public uses, without the person's own consent, or that of the Representative Body, ..."

The purpose of this clause is the same as that of the Fourteenth Amendment of the U. S. Constitution.

"The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute of by its improper execution through duly constituted agents. And it must be regarded as settled that intentional systematic under-valuation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property. Sunday Lake Iron Co. v. Township of Wakefield, 247 U.S. 350, 352-353 (1918)

In this case the systematic overvaluation of properties in a single class must also be considered a contravention of the constitutional rights of the parties so taxed.

The first issue is that of differential taxation, i.e. the taxation of some citizens on a basis different from the rest of the public. Division of taxation into different classes is often necessary from an administrative viewpoint and is not ordinarily an affront to the Equal Protection Clauses. To pass muster the assessments must be evenly applied in a manner that does not bear unequally upon similarly situated individuals, must further a legitimate government purpose, and must be rationally related to the purpose.

In this case the assessments are unevenly applied. Sales show that farms in the Town of Addison were assessed at 155% ±30.5% of their selling prices. This is because the Town assesses farms on all the business assets; on the basis of "going concerns," i.e. not only the real estate but also on the items of personality that are specifically excluded by statute such as cattle, cattle feed, tractors. [5] See 32 V.S.A. § 3751. On the other hand, all other

[5] "...the value of a business as a whole includes (a) the contribution made by the land to the business, (b) the personal property used by the business, (c) the going concern value of the business,(d) the increased

properties, such as residences, commercial, and vacation properties, are assessed only upon the basis of the real estate.

The resulting burden falls exclusively upon the individuals that own property that is eligible for the CU program. They are faced with the choice of either paying the exorbitant taxes or of joining the CU program where they have to agree to a "land use change tax lien" on their properties. The land use tax is forwarded to the town when paid.

"Under the well settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit." *Dolan v. City of Tigard*, 512 U.S. 687 (1994)

Clearly the requirement that a taxpayer give up a lien in perpetuity equivalent to $1/5^{th}$ of his property is an exchange of part of his constitutional right of ownership. Likewise taxation on the same basis and proportion as other properties is a right guaranteed under both the U.S. and Vermont Constitutions. The conditioning one right under the constitution, equal taxation, in exchange for forfeiting another right, ownership, is an unconstitutional condition.

Next, "A legitimate state interest must encompass the interest of members of the disadvantaged class and the community at large as well as he direct interest of the

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value derived from the fact that tangible assets are combined in a single unit and are already functioning in the marketplace, and (e) where appropriate, goodwill." Sharp v. Transportation Board of the State of Vermont, 141 Vt. 480; 451 A.2d 1074; 1982

members of the favored class." *Nordlinger v. Hahn*, 505 U.S. 1 (1992) (Stevens, J., dissenting)

While the owners of other property classes in the Town of Addison benefit, the farmers are the only ones who bear the whole cost, either in excessive taxes or in forfeiting a percentage of their property's value. The State of Vermont as a whole also bears the disproportional burden by excessive payments to the Town under the CU program.

The benefits thus conferred to the favored classes of taxpayers in Addison cannot overcome the burdens placed upon the entire state and upon the farmers in town. This tax scheme fails the legitimate interest test.

The last check is the rational basis test. There is not doubt that the CU program itself meets this test. Among the purposes is "to achieve more equitable taxation for undeveloped lands." By using accurate and actual income and expense information from the Farm Credit System the State is able to accurately appraise farms for taxation. This is why farms in Addison sell for values near their CUV; just as Justice Dooley noted, "...that the Current Use Value and the sale price(s) are so close to each other...". By paying the towns the difference in revenues between the CUV and the listed value the State disperses the burden of the program to the entire class beneficiaries. This meets the requirements of equity and uniformity under the constitutions.

The differential assessments applied by the Town do not meet this test especially when they are part of on going sales chasing. The purpose of sales chasing is to confound equitable taxation; to confute the constitutional requirements; and conceal the fact that the listed value is based upon a roll of the dice. The fact that only those properties that are selected for inclusion in the equalization study are reassessed, and no others, is prima facie proof of the Town's intent to defeat the legitimate rational purpose of the state. The Petitioner called it the same as changing the

numbers on a lottery ticket after the drawing. In addition there would be no need to sales chase if the listed values were accurate in the first place.

The essential nexus is whether the acquisition of lien on the farms rationally furthers the legitimate state purpose or whether the raison d'être for the differential taxation is merely the taking of private property without compensation.

The fact that other similarly situated property owners continue to develop their properties without any impediments or tax in the same manner as they historically have eliminates any public policy claim of a rational state purpose or that it furthers the conservation interest of the state.

Plus the fact that even those owners of properties enrolled in the CU program pay the lien off and develop unimpeded eradicates any constitutional probity to the claim that is justified under the police powers doctrine

There is no doubt that if the Town just demanded or unilaterally placed a lien upon selected properties under its jurisdiction, a violative taking under the Fifth and Fourteenth Amendments would occur. The Fifth Amendment requires a twofold test. First does the burden fall on a few or is it borne by a large undistinguished class and secondly is there "rough proportionality" between the benefits and cost to the individuals affected.

As was shown above neither of these conditions are met. Id. The farmers bear the burden of higher taxes while favored classes of taxpayers receive the benefits.

It must also be noted that these favored classes of owners are also at risk. Should the methodology of taxation in the Town of Addison become the norm, then even homeowners could face differential taxation over the fair market value of their properties unless e.g they grant. a right of way for a highway project.

. "One of the principal purposes of the Takings Clause is to bar the government from forcing some people alone

to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Dolan*, supra

In short the facts prove that the tax regime in Addison is nothing but "an out and out plan of extortion." See *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987)

Argument Question Two

Whether the application of a pre-qualifying test of licensure to determine the credibility of the landowner and the subsequent application of a double standard of review to the evidence based upon these criteria, meet the requirements of due process and equal protection.

Two hundred and thirty eight years ago this nation threw off rule by aristocracy, i.e. that some people can be credentialed by the state as better than others, and embraced the principal that all persons are equal before the law. The founding document of this nation, the Declaration of Independence, lists among the grievances the failure of the King and of "our British brethren" to hear petitions for redress of injury. The fruit of the resulting conflict is found in the Constitutional protections we enjoy. In the First Amendment we are guaranteed the right to petition the government for redress of grievances. Normally this is to an independent judiciary created by the Constitution. The Fifth Amendment guarantees the right to property. Later the Fourteenth Amendment expressly restated the right to due process, equal protection, and right to property as federally guaranteed rights. These rights do not just guarantee the right to plead or to present evidence, but also the right to be heard, to have the evidence impartially weighed and evaluated on a par with all other citizens.

The Constitution of the State of Vermont also guaran-

tees these same rights.

Article 2. [Private property subject to public use; owner to be paid]

That private property ought to be subservient to public uses when necessity requires it, nevertheless, whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money.

"Article 4. [Remedy at law secured to all]

"Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which one may receive in person, property or character; every person ought to obtain right and justice, freely, and without being obliged to purchase it; completely and without any denial; promptly and without delay; comformably to the laws." (Emphasis added)

The State of Vermont, Addison County Superior Court, the trial court, violated these provisions by applying a test of licensure, credentials, to the landowner. It ruled that because "Mr. Boivin is a dairy farmer and not an appraiser." neither his evidence nor his testimony is credible.

The court found on a total of six different occasions that Mr. Boivin was not credible because he was not licensed and in other locations found that the Town's witness was credible on the basis of licensure.

Petitioner asserts that the determination of credibility was based upon licensure and that the evidence was deemed not credible on that basis. He stresses that he has a constitutional right to present his evidence without having to be credentialed by the state or to purchase a license. He maintains that this is a prejudicial violation of the right to petition for redress, equal protection, and due process.

The true test of whether discrimination has occurred is to change the names of the parties in the ruling. If the proclamation has stated that a witness is not credible be-

cause " Mr. Boivin is a (insert an ethnic, religious, or racial minority) and not a(n)(insert a favored class)," there is no doubt that the statement would be declared discriminatory.

The Town claims that the evidence was examined by the trial court and was not believed for the reasons stated. The question arises, if the evidence was not credible on its face then why did the court need to refer to the credentials of the witnesses so many times?

The Vermont Supreme Court states: "Consideration of professional qualifications of a witness is not discrimination against the witness without those qualifications." Is this not like a restaurateur stating that it is not discrimination to not serve minorities because they are not his normal clientele?

The constitution requires free access to the courts. When the courts require credentials purchased from the state for credibility are they not re-establishing the aristocracy? Will the courts next require that a plaintiff be an attorney to petition the court?

From this prejudicial error flowed the complete rejection of all of the Petitioner's evidence, wholesale and totally uncritical acceptance or the Town's, and the application of a double standard to the evidence.

Normally, whether the lack of credentials, results the lack of credibility and in the prejudicial exclusion of the evidence or whether the evidence itself results in the lack of credibility is a "chicken or the egg argument."

Here, proof of prejudicial error, that the decision was based upon credentials alone, is in the double standard applied to the evidence. The trial court excluded evidence presented by the Petitioner while it accepted similar evidence on the same basis from the Town.

Let us first examine the legal basis of the Petitioner's testimony.

Mr. Boivin testified as the owner of the properties under the provisions of the Vermont Constitution Chapter

One, Article 4 and under 12 V.S.A. § 1604 "Value of property; owner as a competent witness. The owner of real or personal property shall be a competent witness to testify as to the value thereof."

In addition, V.R.C.P Rule 702. Testimony by Experts states:

"If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience training, or education, may testify thereto in the form of an opinion or otherwise."

Fed. R. Evid. 702 Testimony by Experts begins exactly the same but adds

"... if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

The Fed. R. Evid. 702 Advisory committee note states:

"(Within) the scope of the rule are not only experts is the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called "skilled' witnesses, such as bankers or landowners testifying to land values."

Under these rules Mr. Boivin, as the landowner, is clearly qualified. The trial court noted, "He does have a college degree in Business Administration and Finance (banking) and is quite skilled in mathematics." Nowhere do these rules apply a test of licensure. The trial courts application of this requirement is spurious, arbitrary, and capricious.

A license is purchased from the state and the requirement that a witness possess one violates the remedy at law provision of the Vermont Constitution. Moreover, possession of a professional license does not prove accuracy of the testimony any more than possession of a driver's li-

cense proves that a motorist did not go through a red light.

The decision of the trial court to base its decision on whether a witness has bought a license, credentials, from the state would clearly violates the founding principals of this nation, due process rights, equal protection, and the expressed requirements of the Vermont Constitution.

Returning to the issue of double standards we will next examine the VSC entry order.

The first issue is that of the inclusion or adjustment for non-taxable personal property in the comparable sales. There was no dispute that non-realty property was included with the real estate in the sales used. Nor is there any doubt that 32 V.S.A. § 3802(8) exempts these items from taxation. Likewise it is clear that USPAP requires an appraiser to account for the value of chattel in sales of real estate. See USPAP Standards Rule 1-2(e)(iii) & 1-4(g). Mr. DeVries in testimony acknowledged that it is necessary to adjust for non-realty items in the comparable sales. Even though he had done fee appraisals on two of his comparables in which he had valued the items of personality, he made no adjustments.

Nevertheless the trial court refused to accept any adjustment by the Petitioner to the property transfer tax returns for items of personality included in the sale.

On the other hand the court readily accepted changes on these same returns by the Town. The Town changed the listed values recorded on these returns prior to putting the new assessments in the equalization study (sales chasing). The changes in these returns are prima facie evidence of sales chasing.

On the issue of sales chasing the Vermont Supreme Court ruled that the issue was neither the subject of evidence nor argument before the trial court and was therefore not preserved for appeal. This ruling overlooks the fact that the property transfer tax returns were presented and that their significance was the subject of testimony.

Fed. R. Evid. Rule 103, Rulings of Evidence

(a) Effect of erroneous ruling

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and …

(2) Offer of proof. – In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal. …

(d) Plain Error

Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

With regard to sales chasing, the property transfer tax returns were in evidence, the Petitioner drew attention to the sales chasing, which was in plain sight of the court. The Town knew about the evidence and did not object or contest the evidence. The after the definitive ruling was made, the Petitioner made a timely appeal of the error. The Vermont Supreme Court only is avoiding the issue.

Both the trial court and the Supreme Court thereby apply a double standard of justice, first excluding the Petitioners evidence for making a legitimate adjustment for items of personality and at the same time accepting without question the unconstitutional sales chasing by the Town.

Likewise the courts apply a double standard to the Petitioner when they dismiss his evidence because he "did not use accepted appraisal methods."

The method applied by the Petitioner is the same procedure that the PVR uses in the State's Equalization Study.

Likewise in the Discounted Cash Flow method the Pe-

titioner use the appraisal values generated by the State of Vermont for its CUV program. These values were deemed not credible because Mr. DeVries stated that this method was not used for farms.

On the other hand, the court readily accepted violation of USPAP by Mr. DeVries, e.g. the inclusion of personal property in the appraisal of real estate, circular reasoning, and the use of confidential U.S. Farm Service Agency information.

The Vermont Supreme Court stated, "Taxpayers correctly point out that Vermont law does not require a particular valuation method or evidence to support that method."

Nevertheless the Supreme Court upholds the trial court's exclusion of the Petitioner's evidence on the testimony of Mr. DeVries that it did not follow his method of appraisal. This is a double standard.

It is axiomatic that a double standard is neither equal protection nor due process.

We hereby petition this Honorable Court to grant a writ of certiorari because the Vermont courts will not apply a constitutional standard to the evidence.

REASONS FOR GRANTING THE PETITION

The Town of Addison has discovered the way to maximize its revenues. First it taxes the farm under its jurisdictions on a differential basis from other properties, i.e. as "going concerns" including the items of personality specifically exempted by statute. This differential assessment scheme impels the landowners in town to join the State's Current Use Program. When they do so the Town collects from the State of Vermont "free monies" that are not justified by actual property values. In addition the Town acquires the benefits of a lien upon the farms for $1/5^{th}$ of their assessed values.

In order to perpetuate this scheme and to conceal it

from being revealed in the State's Equalization Study the Town engages in unconstitutional sales chasing.

The Vermont Supreme Court does not see any problem with the fact that farms sell for the Current Use Value and are listed for far more than their fair market values. It sees no problem with requiring farmers to enroll in the Current Use Program, thus giving up an interest in their properties, in order to get taxed at the selling prices of their properties. "That is of course what the Current Use Program does."

The courts ignore manifest and unambiguous evidence of sales chasing. The courts allow the inclusion of non-taxable items in the tax assessments. The courts apply a double standard to the evidence; excluding even values generated by the State itself, because they were introduced by the Petitioner who has not purchased an appraisal license from the state.

This Court has stated:

"A power to tax differentially, as opposed to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency." Minneapolis Star & Tribune Co. v. Minnesota Comm'n of Revenue, 460 U.S. 575 (1983) at 585.

Allowing the differential tax structure manifested here to perpetuate places all property owners at risk. Any authority that wants private property could just tax for it. For example dwellings could be taxed upon the value of the contents unless the owners give up a right of way for a new road. Appeals would be dismissed because the homeowners are not licensed professional appraisers.

We respectively pray that this Honorable Court will defend the rights guaranteed under the Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Mark A. Boivin – pro-se

Date: March 1, 2004

Appendix A

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER
SUPREME COURT DOCKET NO. 2003-236
DECEMBER TERM, 2003

VERMONT SUPREME COURT
FILED IN CLERKS OFFICE
DEC 0 4 2003

Mark Boivin,	}	
Paul Boivin, and	}	APPEALED FROM:
No-Mon-E Farms	}	Addison Superior Court
Assoc.	}	DOCKET NO. 190 194
v.	}	195-9-00 Ancv.
Town of Addison	}	Trial Judge:
	}	Helen M. Toor
	}	

Taxpayers own three parcels of real property in Addison, Vermont. This appeal concerns the listed value, for the year 2000, the Addison Superior Court established for the property after a de novo appeal from the Addison Board of Civil Authority. We affirm.

Taxpayers are brothers who jointly own three lots in the Town of Addison. Parcel one is a 289 acre lot with a dwelling and farm buildings. The Town of Addison originally assessed parcel one at $372,700 in 2000. Parcels two and three consist of 98 and 80 acres respectively. In 2000, Addison assessed parcel two at $106,300 and parcel three at $88,700.

All three parcels are used for dairy farming, although they were last enrolled in Vermont's current use program in 1996.

Contending that Addison's valuation of their property was too high, taxpayers sought relief from the Addison Board of Civil Authority, and later from the superior court under 32 V.S.A. § 4461(a). The superior court took evidence on the matter over two days in January 2003 after visiting the property the previous month. At trial, Addison offered an appraisal of the three parcels from a licensed real estate appraiser, Justus DeVries, who also testified in support of his work. Taxpayer Mark A. Boivin testified on his and his brother's behalf. Although Boivin is not a licensed appraiser, he holds a college degree in business administration and finance, and he offered his opinion on the value of the property. Boivin based his opinion on analyses he conducted using three valuation methods ultimately rejected by the superior court.

On April 29, 2003, the superior court issued a written decision on taxpayers' appeal. The court found the fair market value of parcel one was $408,000. For parcels two and three, the court found fair market values of $122,500 and $96,000 respectively. The court found the proper equalization ratio to be 93.02%. Applying that ratio to the properties' fair market value resulted in a listed value of $379,521 for parcel one, $113,949 for parcel two, and $89,299 for parcel three. The superior court entered judgment accordingly, and this appeal followed.

Taxpayers present several arguments as to why the superior court's decision should be reversed. Principally, they complain that the court erred by rejecting Boivin's analyses in favor of the testimony and appraisal offered by Addison through its expert witness DeVries. To put taxpayers' specific claims of error in context, we briefly address the legal requirements applicable to tax appeals in superior court and the

standard of review in this Court from judgments rendered in such appeals.

An appeal under 32 V.S.A. § 4461(a) requires the superior court to determine, de novo, the correct value of the property at issue. 32 V.S.A. § 4467. If the superior court "finds that the listed value of the property subject to appeal does not correspond to the listed value of comparable properties within the town, ...the court shall set said property in the list at a corresponding value." Id. On appeal, we will uphold the court's conclusions if they are supported by the findings, which in turn must be supported by the evidence. Kachadorian v. Town of Woodstock, 149 Vt. 446, 448, 450 (1988). The court is, however, sole arbiter of evidentiary credibility, weight, and persuasiveness. See Scott Constr.. Inc. v. City of Newport, 165 Vt. 232, 236 (1996) (in appeal of tax assessment, court is free to weigh any relevant, competent, and probative evidence of valuation); Harte v. Town of Bennington, 153 Vt. 256, 258 (1989) (persuasiveness of testimony in tax appeal is for court to determine). Because the court's decision is presumptively correct, taxpayers bear the burden to demonstrate that the court's exercise of discretion was clearly erroneous. See Lake Morey Inn Golf Resort. Ltd.P'ship v. Town of Fairlee, 167 Vt. 245, 248 (1997).

A two-step process determines whether a property's listed value for tax purposes corresponds to the listed value of comparable properties within a town. Kachadorian, 149 Vt. at 447. The first step involves establishing the property's fair market value. Id. A property's fair market value is the price the property would bring in the market taking into account the property's potential uses, availability, and limitations. Id. at 448. The Court will not disturb a fair market valuation absent a showing of clear legal error. Id. at 448-49.

The second step in the process involves equalizing the

property's fair market value "to insure comparable listing with other corresponding properties." Id. at 447. This step depends upon the existence of comparable properties within the town. Id. Where comparable properties exist in the town, the equalization ratio is derived from a comparison between the comparable properties' current market value and their listed value. Id. If no properties comparable to the taxpayer's exist in the town, the equalization ratio used is the common ratio of all properties in the town. Id. at 448.

Taxpayers first argue that the court should have accepted Boivin's analyses of fair market value because he complied with the directive in 32 V.S.A. § 4041 and DeVries did not. Contending that the statute required him to do so, Boivin inspected each comparable used in his analysis to determine which items of personal property, like tools and equipment, must be deducted from the total value of the comparable to ascertain its true value. While DeVries inspected each comparable he used in his analysis, he relied on the price set forth in property transfer tax forms, without further deductions for personalty included in the sale, because the tax is imposed only on real property. Taxpayers argue that DeVries violated § 4041, and thus, the court should have rejected his appraisal.

Section 4041 requires town listers to appraise property at its fair market value, and to inspect such property to the extent necessary to make that determination. 32 V.S.A. § 4041; In re Town of Essex, 125 Vt. 170, 172 (1965). Nothing in the language of the statute requires the town, or its appraiser, to inspect each comparable property for items of personalty that may have been included in the sales price of the comparable, and then to determine whether the seller and buyer properly allocated the price between real and personal property on the property transfer tax return. The superior court did not accept Boivin's approach because he rejected the values listed on the state's property transfer tax returns for reasons the court

found unpersuasive. The court explained that,

> [a]lthough it is true the parties to the sale may have motives to value the real estate higher or lower than its actual value, the buyer and seller have opposing positions with regard to whether a higher or lower value is desirable, and they are required to accurately list the value on the returns.

The court also noted that Boivin's approach would result in a fair market value of parcels two and three that are significantly lower than the values of those parcels in 1990 and 1996. In sum, taxpayers' first claim goes to the weight of the evidence, a matter committed to the trial court's discretion. Scott Constr.. Inc., 165 Vt. at 236. Taxpayers first argument is, therefore, unavailing.

Taxpayers next argue that the superior court erred by excluding Boivin's equalization studies from its consideration. They contend that Boivin's equalization studies comply with the law, and thus it was an abuse of discretion for the court not to apply them. Like taxpayers' first argument, their second claim goes to the weight the trial court accorded the evidence, a decision we will not disturb on appeal. See id. Even if we were to find error in the court's decision to discount Boivin's equalization studies, we would find the error harmless and not subject to reversal on appeal. See V.R.C.P. 61 (court must disregard any error not affecting a party's substantial rights). The equalization ratio the court ultimately used -93.02% -is less than the ratio Boivin suggested was appropriate. Thus, had the court accepted Boivin' s equalization ratio, the result would have been a higher listed value for each parcel than the values set forth in the court's final judgment.

The third claim taxpayers raise concerns the court's rejection of Boivin ' s discounted cash flow (DCF) analysis to de-

termine fair market value. This approach seeks to value the property by determining its profitability. The DCF method is used for the state's current use program, a program in which taxpayers were no longer enrolled after 1996. The court declined to utilize the DCF method because it found that the method is not generally used for farms. The court's finding that the DCF method is not properly used to establish the fair market value of farms is supported by the evidence, and is not clearly erroneous. As such, we find no reason to disturb the court's ruling.

We note that the court's decision to weigh more heavily DeVries's appraisal was based on its assessment that Boivin's analyses were flawed. As the court explained, Boivin

did not use accepted appraisal methods. He mixed listed values with sales values, and made adjustments to sales prices based upon theories the court does not accept. ...

...[H]e did not use standard appraisal methods in selecting or comparing them to the parcels at issue. He used parcels that were not operating farms, and ones without the more modern free-stall barn and milking parlor on Parcel 1. He did not weight the properties according to their assets and liabilities, as Mr. DeVries did, but instead averaged them to reach his valuations. ...Moreover, Mr. Boivin's calculations lead to values for Parcels 1 and 2 that are significantly lower than their values in 1996 and 1990, respectively. This further demonstrates the invalidity of his calculations.

Taxpayers have failed to demonstrate reversible error here.

Taxpayers attack the trial court's finding that DeVries uses the Uniform Standards of Professional Appraisal Practice when doing appraisals. They do not contend that the evi-

dence does not support the finding, but, rather, assert that DeVries did not adhere to the standards set forth in the Uniform Standards. The problem with taxpayer's argument is two-fold. First, absent a showing that the finding lacks any evidentiary support, it must stand. Kachadorian, 149 Vt. at 450. Second, taxpayers fail to demonstrate that adherence to the Uniform Standards of Professional Appraisal Practice is necessary to determine' fair market value. In other words, unless the law requires the court to rely on those standards, its failure to do so alone is not reversible error. See id. at 448-49 (unless an error of law exists, Court will not disturb the superior court's determination of fair market value). In this case, the court was faced with conflicting evidence of fair market value. It sorted through that evidence and gave more weight to the evidence offered by Addison. Although there may be flaws in the appraisal DeVries performed, it was ultimately up to the trial court to arrive at a fair market value based on the evidence. See Lake Morey Inn, 167 Vt. at 249 (trier of fact's decision on fair market value must be based on evidence and supported by findings, but it is not error to weigh evidence of one party more heavily). Taxpayers have not shown that the court's determination is without basis, and we therefore decline to disturb its ruling based on a single finding about De Vries's use of the Uniform Standards of Professional Appraisal Practice.

The fifth issue taxpayers raise relates to the effect of ' 'sales chasing" by Addison. According to taxpayers, "sales chasing" involves reappraising or adjusting listed values of some properties that have sold within a town while not reappraising the remaining properties in the same class. Addison responds that the issue of "sales chasing" was not preserved for review. Aside from Boivin's comment at trial that he believed Addison was engaged in "sales chasing," the issue was neither the subject of evidence nor argument before the trial court. Thus, we agree with Addison that the issue was not

preserved for appeal, and we decline to address it. Harrington v. Dep't of Employ. & Training, 152 Vt. 446, 448 (1989); see also V.R.A.P. 28(a)(4) (appellant's brief must explain how issues were presented below and preserved for appellate review).

Taxpayers claim that the superior court erroneously increased, over Addison's original

assessment, the fair market and listed values for parcels two and three. They claim that the increase is without evidentiary support and point to flaws in DeVries's testimony and analysis. If taxpayers were correct that the court's findings on fair market value and listed value lacked any support in the evidence, we would agree that reversal is required. In this case, the court had a lengthy written appraisal supporting the values it ultimately found, in addition to explanatory testimony from the expert who prepared the appraisal. "When the evidence is conflicting, the credibility of witnesses, weight of the evidence and its persuasive effect are matters for the exclusive determination of the trier of fact." Gilbert v. Davis, 144 Vt. 459,461 (1984). Taxpayers had the opportunity to present their criticisms of Addison's evidence to the trial court, which resolved the evidentiary conflict against taxpayers. Because the court's decision is grounded in the evidence and is supported by its findings, we will not overturn it.

Taxpayers' final claim is similarly unavailing. They argue that the court's decision to accord Boivin's testimony little or no weight is reversible error because a property owner may testify as to the fair market value of his property. Taxpayers correctly point out that Vermont law does not require a particular valuation method or evidence to support that method. Lake Morey Inn, 167 Vt. at 248-49; Sondergeld v. Town of Hubbardton, 150 Vt. 565, 567 (1988). Once the court admits evidence as to fair market value, however, it is "under no obligation to accept, interpret, or apply evidence in accordance

with the views of either party." Kruse v. Town of Westford, 145 Vt. 368, 374 (1985). The court properly admitted Boivin's testimony and considered it. In resolving the differences between Boivin's testimony and DeVries's testimony the court could consider that DeVries was a professional appraiser and Boivin was not. Consideration of the professional qualifications of a witness is not discrimination against the witness without those qualifications.

Affirmed.

BY THE COURT:
"s/ Jeffrey L. Amestoy,"
Jeffrey L. Amestoy, Chief Justice

"s/ John A. Dooley,"
John A. Dooley," Associate Justice

"s/ Marylyn S. Skoglund,"
Marylyn S. Skoglund," Associate Justice

APPENDIX B

STATE OF VERMONT
ADDISON COUNTY, SS.

Mark A. Boivin and Paul A. Boivin	)	SUPERIOR COURT
vs.	)	Docket nos. 190-9-00, 194-9-00 and 195-9-00
TOWN OF ADDISON	)	

Addison Superior Court
Filed
Apr. 29 2003
Kathleen B. Keeler
Clerk

RULING ON TAX APPEALS

This case is a tax appeal pursuant to 32 V.S.A. § 4461 involving three parcels of property in the Town of Addison ("the Town"). The plaintiffs appeal the August 19, 2000, decision of the Addison Board of Civil Authority upholding the Town's valuation of the three properties. Plaintiffs argue that (1) their parcels are over-assessed in comparison to similar properties in the Town, and (2) the equalization values are

incorrect. A site visit was held on December 20, 2002, and a court trial took place on January 22 and 23, 2003. Post-trial memos were filed on February 6.

Findings of Fact

The plaintiffs in this case are two brothers who jointly own all three properties at issue. The parties agree that the three parcels are all currently used for dairy farming. The challenged assessments are for the year 2000.

The three lots at issue are as follows: Parcel 1, the "Home Farm," is a 289 acre lot; Parcel 2, the "Loomis Parcel," is a 98 acre lot, and Parcel 3, the "Andrews Parcel," is an 80 acre lot.[6] The Town assessed the lots in 2000 as follows:

Parcel 1: $372,700
Parcel 2: $106,300
Parcel 3: $88,700

See Exhibits 1-3.

At trial, the plaintiffs' only witness was plaintiff Mark Boivin. Mr. Boivin is a dairy farmer, not an appraiser. He does have a college degree in Business Administration and Finance, and is clearly quite skilled at mathematics. All of the calculations in plaintiffs' exhibits were done by him.

Mr. Boivin did his own valuation of each parcel of property. He believes the highest and best use of all three parcels is as agricultural land. He concluded that the fair market value of the properties is as follows:

Parcel 1: $226,800
Parcel 2; $62,900
Parcel 3: $47,500

See Exhibit 101. Mr. Boivin calculated these values by using several approaches. He compared all farm sales within

[6] All acreage referred to is "plus or minus" the acreage stated.

four miles of the properties, rejecting certain ones that involved sales to nonprofit agencies, foreclosures, a commercial bed and breakfast, and interfamily transfers on the theory that they are not valid comparables.. He used a "Market Value Analysis" as well as a "Discounted Cash Flow Analysis" and a "Cost Comparison Analysis." He also calculated what he believed to be the financial impact of having noncontiguous parcels of land, since Parcel 3 is not contiguous to the others in this case

Under the Market Value Analysis, Mr. Boivin used what he called a "residual approach," meaning that he looked at the sale prices of the comparable properties and adjusted the real estate values by subtracting the value of tools and equipment that were sold with the land. He did this by talking to buyers and sellers and at times inspecting the properties himself. For example, he subtracted $15,000 from one sale (Visser) because he found 1/2 silo of feed, 1/2 drum of soap, forks, brooms, gutter cleaners, fans and milking equipment were part of the sale, and valued them at $15,000. He made similar adjustments in the range of $10,000 to $15,000 on several other sales (e.g. Blacklock, Gevry, Rivers, Waterman). As a result of these adjustments, Mr. Boivin concluded that the value of the real estate itself in these comparables was lower than the actual sale price. In making these adjustments, Mr. Boivin did not rely upon the property transfer tax returns, even though the buyers and sellers are required to break down on those forms what part of the sale price is for the real estate and what part is for tools and equipment.

Mr. Boivin used another method of evaluation, the "Cash Flow Analysis." In this analysis, he used the approach he says is used by the State in calculating value for the current use program It takes into account the estimated rate of return of farmland and the current interest rates,

Mr. Boivin also used the "Cost Comparison Method, "which he explained "takes the market value of raw land [and] adds the cost of replacing the improvements less depre-

ciation. See Exhibit 101[7]. In this analysis he tried to account for the depreciation of farm buildings and what he described as "super-adequacy," such as having a milking parlor that is too large to be fully utilized if the parcel it is on is sold alone. He explained that farm buildings lose value when you do not have the land to use them. In other words, a 120-cow milking parlor is not worth its full price if it is on a parcel of land that can only sustain 50 cows. Thus, Mr. Boivin argues, if the parcel with the milking parlor were sold alone, without plaintiffs' other parcels, the value attributable to the milking parlor would be less. Mr. Boivin concluded that the value of farm buildings without the land they sit on is zero.

Mr. Boivin concluded that the fair market value of land in Addison is close to the current use value rather than the listed value. See Exhibit 101.

Mr. Boivin acknowledged that he did not know whether his approaches followed standard real estate appraisal methods. He also acknowledged that he mixed market values with listed values in doing some of his calculations. With regard to the cash flow analysis he used, he acknowledged that it was based on statewide averages, not on the actual income and expenses from plaintiffs' properties. With regard to the cost comparison method, he acknowledged that a professional appraiser would have inspected the properties and calculated the actual depreciation on the structures, but that he did not because he did not have the right to go onto other people's property to do so.

Mr. Boivin also acknowledged that properties with tie-barns and those with free-stall barns are not necessarily equivalent. Plaintiffs' Parcel 1 has a free-stall barn that can hold 125 cows. He agreed a free-stall barn is more economical if one has over 150 cows. He also agreed that many sales

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[7] Plaintiffs' exhibits have no page numbers, so the court has no page numbers to cite

of farmland are going to expand larger operations these days --buying additional acreage to increase efficiency.

With regard to comparing properties, Mr, Boivin did not agree that tillage (plowable land) has a higher value. than pasture. Nor did he consider road frontage, access to utilities, or views to be an asset when valuing property.. His comparables were not chosen based upon such factors. He also did not take into account in his comparable sales whether the farms were actually in operation or vacant at the time of sale.

Finally, Mr. Boivin acknowledged that plaintiffs' property was in the current use program in1996, and was removed from the program after that. He agrees that the current use value of Parcel 1 in 1996' was $246,500. Thus, under his analysis, valuing the parcel at $226,800 in 2000, the value of the property would have decreased by about $20,000 between 1996 and 2000. With regard to Parcel 2, which he values as of 2000 at $62,900, he agreed the plaintiffs purchased it thirteen years earlier for about $2,000 more ($65,000). He claims they paid "a premium for its proximity and because we needed to mitigate damages for water running down on our property."

In response to this litigation, in 2001 the Town had an appraisal of the three subject parcels performed by Justus DeVries, Jr.[8] Mr. DeVries has been a licensed appraiser for over ten years, and is certified to do appraisals for the Vermont Tax Department and the Agency of Transportation. He also does farm appraisals for various lending institutions including the National Bank of Middlebury and the Chittenden Bank. He has done between fifteen and twenty farm apprais-

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[8] Plaintiffs appear to argue that an appraisal done subsequent to the Town valuation is somehow irrelevant or insufficient. *See* Memorandum filed Feb. 6, 2003. It is clear that such an appraisal is an appropriate way for the Town to justify its valuation. *See* Littlefield v. Town of Brighton, 151 Vt. 600,602 (1989).

als in the last five years, In performing appraisals he uses the Uniform Standards of Professional Appraisal Practice published by the Appraisal Foundation, and the methodologies of the Appraisal Institute set forth in the text The Appraisal of Real Estate.

In doing the appraisals in this case, Mr.. DeVries inspected each of the subject properties and reviewed all tax maps, legal descriptions, assessment cards and deeds. He used the Market Data Approach and the Sales Comparison Approach. 1n valuing operating dairy farms and open land, appraisers generally rely upon the Sales Comparison Approach. With regard to the farm buildings, he also used a Cost Approach, looking at the replacement costs minus depreciation. Farms are not generally evaluated based upon the Income Approach. He agreed with plaintiffs that the highest and best use for Parcel 1 is as agricultural land, but concluded that Parcels 2 and 3 could be best used as a combination of residential and agricultural/woodlands.

Mr. DeVries concluded that the value of the properties as of April 1, 2000, was as follows:

Parcel 1: $408,000[9]
Parcel 2: $122,500
Parcel 3: $96,000

See Exhibit 8. In reaching this conclusion, he used numerous comparable properties in Addison and surrounding towns. See Exhibit 8. In choosing comparables, he considered the currency of the sale date, the location in comparison to the subject properties, and the type of farm structures. For Parcel 1, which contains the homestead, he separately analyzed residential sales and large acreage sales. Id., pp. 16-30. For all three parcels, he assigned value to various elements of

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[9] He originally appraised Parcel 1 at $410,000 but later added another recent comparable sale and reduced his appraisal to $408,000. *See* Exhibit 8.

the comparable sales, such as the number of tillable acres, the number of acres of pasture, the number of acres of woodland, the type, quality, and age of farm buildings, the availability of utility services, road frontage, and views. See, e.g., id. at 29-30.

For example, Mr. DeVries reviewed soil maps to determine how many acres of each property were tillable versus pasture or woodland. He analyzed the comparable sales and came up with different values per acre for the different types of soils. He also adjusted values based upon the town, because land values are lower in Addison than Salisbury, for example. Each comparable received different weight depending upon how similar" it was to the subject properties.

Mr. DeVries also applied a "sale time price adjustment" based on the fact that the market is appreciating. He knows this because he tracks sale and resale prices. See Exhibit 8 p. 134. The appreciation in values since 1998 is "fairly significant."

Mr. DeVries disagreed with Mr. Boivin's approach to valuing the properties for several reasons. He felt that Mr. Boivin ignored vacant land sales, did not use a standard approach for identifying and weighting comparable properties, used a method not generally applicable to dairy farms (the cash flow approach), used comparables with conventional barns rather than free stalls and without milking parlors, used some distress sales, included non-operating farms as comparables, and used assessed values when he should have used market sales values. He also averaged comparables, whereas standard appraisal practice calls for making adjustments to the properties and weighting them. He also used a method not accepted for valuing operating dairy farms -the Discounted Cash Flow Analysis.

With regard to the issue of "equalization," Mr. DeVries identified Exhibits 6 and 7 as the State Tax Department's Year 2000 and Year 2001 equalization studies. The 2000 one covers the period April 1, 1997 through March 31~ 2000. See

Exhibit 6. The 2001 one covers the period April 1,1998 through March 31,2001. See Exhibit 7. These are reports the Tax Department prepares for each town showing a statistical analysis of listed land values compared to sales prices in the town. The reports break down land into various categories and show the ratio of listed price to sales price (from property transfer tax returns). For example, if the report reflects an "applied ratio" of 95%, it means that land in that category in Addison was listed at 95% of sales prices. The reports also report the statistical validity of the ratios for each category of sales. This is reflected by the question "Class sample valid?" and answers "Yes" or "No." See, e.g., Ex. 6 page 6.4, If the answer is "yes," the report reflects at least a 90% confidence level that the "true aggregate ratio is within 10% of sample ratio." Id.

The 2000 and 2001 studies show in the "Certified Final Computation Sheets" that various categories of property were listed in Addison for the following percentages of sales prices:

Property Type	% of Sales Price: 2000	% of Sales Price: 2001
Residential properties under 6 acres	91.68	95.63
Residential properties over 6 acres	91.01	100.69
Farm properties	100.23	105.59
Woodland properties	100.23	105.59

All properties combined:	96.82	93.02

See Exhibits 6, p. 6.2, and 7, p. 7.2.

As plaintiffs point out, however, the farm and woodland ratios used in the report are actually based upon combining farm, woodland and "miscellaneous" categories. For example, in the Farm

category, the 2000 report shows only one transaction and therefore it concludes that the ratio for that category -- 105.95 --is not statistically valid. See Ex. 6 p. 6.11. The same is true for Woodlands, which only two sales are shown and thus the ratio of 112.98 is not found to be valid. Id. p. 6.12. Thus, the ratios of 100.23% used for Farms and Woodlands in the 2000 Final Computation page(page 6.2) are actually based upon combining farms, woodlands, and 15 sales of "Miscellaneous" properties. See Id.. pp. 6.14 and 6.5 (Farm, Woodland & Misc. is 100.23%).

Likewise, for 2001 the Farm category shows only two sales, and therefore finds the 113.30% ratio for that category to be statistically invalid. See Ex. 7 p. 7.10. There is no separate listing for Woodlands at all, apparently because there were no such sales. The figure used on the Final

Computation sheet for these two categories, 105.59%, comes from combining the Farm figure with the "Miscellaneous" figure, which included 16 sales and had a ratio of 101.66%. Nowhere is there an explanation of precisely what is included in the category of "Miscellaneous."

Mr. DeVries testified that the category most applicable to the land in this case is the combined"Farm; Woodland and Miscellaneous" category. Based upon these equalization studies, Mr. DeVries concluded that the listed value of such properties in Addison is close to 100% of fair market value

Mr. Boivin did his own ratio analysis based on farm sales in Addison from 1996 through 2000. See Exhibit 101, Ratio Study. Contrary to the State Tax Department conclusions, he

concluded that the ratio of listed price to sales price for such sales has actually been 155.39%. This was based upon-two sales in 1996, one in 1997, two in 1998, and one in 2000. See Id.., Market Value Analysis-Sale Comparison Grid. Thus, it used different time periods for analysis than the state calculations. In addition, Mr. Boivin used "adjusted" sales prices for the properties based upon his own calculations of the value of real estate versus personal property, as opposed to using the actual reported sales prices from the property transfer tax returns.

Conclusions of Law

The dispute before the court is over whether the Town has correctly valued plaintiffs' property. The statute that must guide the court here reads as follows:

Upon appeal to... the court, the ...court shall proceed de novo and determine the correct valuation of the property...If the ...court finds that the listed value of the property subject to appeal does not correspond to the listed value of comparable properties within the town, the court shall set said property in the list at the corresponding value. 32 V. S .A. § 4467. Thus, there are "two steps: the establishment of fair market value and equalization of that value to insure the comparable listing of comparable properties." Vermont Electric Power Co., Inc. v. Town of Cavendish, 158Vt. 369, 372 (1992).

The Town's assessments carry a presumption of validity. Heindel v. Town of Grafton, 140 Vt. 147,149 (1981)."Once the town introduces the appraisal of the taxpayer's property into evidence the burden is on the taxpayer to overcome this presumption." Id. That burden "can be satisfied by the introduction of evidence fairly and reasonably tending to show that the property is assessed at more than fair market value, or that the assessment is at a higher percentage of fair market value than comparable properties." Id. If the taxpayer produces such evidence, the presumption accorded the Town disappears and the appraisal must be supported by additional

evidence. The Town can "justify the appraisal either by showing that it substantially complied with all the relevant statutory and constitutional requirements, or by substantiating it with independent evidence relative to the property's fail' market value and the listed value of comparable properties." Littlefield v. Town of Brighton, 151 Vt. 600, 602 (1989). However, the "burden of persuasion as to the contested issues in a § 4467 hearing remains at all times with the taxpayer." Id. at 508. In other words, the "burden of persuading the trier of fact that his property is over-assessed... remains with the taxpayer throughout the entire-proceeding." Kruse v. Town of West ford, 145 Vt. 368,372 (1985).

1. Fair Market Value

Fair market value is determined by considering the highest and best use of the property Scott Construction, Inc. v. Newport Board of Civil Authority, 165 Vt. 232,235 (1996). In this case, there is no dispute that the highest and best use of Parcel 1 is as farmland, The parties disagree over whether Parcels 2 and 3 are also appropriately valued in part for residential use. There is no dispute that the three properties should be separately assessed. In determining fair market value, "[c]onsideration should be given to the property's use and all other elements which combine to give a property a market value." Bloomer v. Town of Danby. 135Vt. 56, 57-58 (1977). This may include consideration of "location, type of land, accessibility, or sale price of comparable property. to name a few" factors. Id. "Comparable properties are rarely. if ever, identical properties...the degree of comparability goes to the weight of the evidence..." ,Scott Construction, 165 Vt. at 239. There is no requirement that only land within the same town be used for comparables. Kachadorian v. Town ofWoodstQck, 149 Vt. 446,449 (1988).

With regard to the issue of highest and best use of Parcels 2 and 3, Mr. DeVries explained that the road frontage and utility access, as well as the views from those properties, made them desirable for residential use. Plaintiffs offered lit-

tle to undercut Mr. DeVries' opinion on this point, and the court's site visit supported Mr. DeVries' assessment. The court accepts his conclusions on this issue

Although Mr. Boivin did numerous calculations to show that the fair market value of plaintiffs' properties is lower than the Town has assessed, the court was unconvinced. He is not trained or licensed as an appraiser, and did not use accepted appraisal methods. He mixed listed values with sales values, and made adjustments to sales prices based upon theories the court does not accept. Specifically, he rejected the values listed in property transfer tax returns and subtracted thousands of dollars from those values based upon his own valuation of equipment, feed, etc. The court does not find it reasonable to reject the valuations placed upon the property in the property transfer tax returns. Although it is true the parties to the sale may have motives to value the real estate higher or lower than its actual value, the buyer and seller have opposing positions with regard to whether a higher or lower value is desirable, and they are required to accurately list the value on the returns. Thus the court is unwilling to accept plaintiffs' revaluations.[10]

Similarly, the court does not accept Mr. Boivin's choice of comparable properties, as he did not use standard appraisal methods in selecting or comparing them to the parcels at issue. He used parcels that were not operating farms, and ones without the more modem free-stall barn and milking parlor on Parcel 1. He did not weight the properties according to their assets and liabilities, as Mr. DeVries did, but instead averaged them to reach his valuations. The court found Mr. DeVries' criticisms of Mr. Boivin's valuation methods to be

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[10] Moreover, "the fact that personal property is difficult to appraise fully and fairly is notorious, both nationally... and in Vermont..." Knollwood Building Condominiums v. Town of Rutland, 166 Vt. 529,537 (1997)(citations omitted).

legitimate and rejects Mr. Boivin's calculations of fair market value for all of those reasons. Moreover, Mr. Boivin's calculations lead to values for Parcels 1 and 2 that are significantly lower than their values in 1996 and 1990, respectively. This further demonstrates the invalidity of his calculations.

Thus, the Town's assessed values have not been undercut by the plaintiffs' evidence. To the contrary, the Town has demonstrated that the fail- market value of the properties as of April 2000 was actually higher than the Town's assessments. Because the statute requires that the court "determine the correct valuation of the property" (32 V. S .A. § 4467), the court concludes that the values assigned by the appraiser are applicable even though they are higher than those assigned by the Town. See, In re Milot, 151 Vt. 615, 617 (1989)(affirming use of higher valuation presented at trial). The court therefore finds the fair market values are as follows: Parcel 1, $408,000; Parcel 2, $.122,500; Parcel 3, $96,000.

2. Equalization

The second issue for the court is what is referred to as "equalization." To determine the equalization ratio, " [i]f comparable properties do exist, then a comparison must be made between their current fair market value and their listed value... This comparison will yield the equalization ratio which must be applied to the fair market value of the subject property to determine its listed value." Kachadorian v. Town of Woodstock, 149 Vt. at 448-49.

The parties have offered different equalization figures. The Town offers the State Tax Department analyses. See Exhibits 6 and 7. The plaintiffs offer Mr. Boivin's calculations based upon sales from 1996 tht.ough 2000. As noted above, Mr. Boivin's calculations use adjusted values for the property sales based upon his subtraction of value for equipment, feed, and so forth. The court has already rejected such recalculations of value. In addition, Mr. Boivin has used a different time period than the Tax Department studies. While there is

no evidence that one time period is more or less appropriate than another, the court concludes that the Tax Department studies are reasonable approaches and that plaintiffs have offered no reason to reject the time periods applied by the Tax Department. Thus, the court will use the Tax Department calculations.

However, that does not end the story. There still remains the question of how to apply those calculations. First, there are two sets of calculations, one for the period from April 1, 1997 through March 31, 2000, and one for the period April 1, 1998 through March 31, 2001. The parties did not address which study is most appropriately relied upon in this case. The court concludes that the more recent figures are most relevant, since the issue is value as of April 1,2000, and the later study includes a period spanning that date.

The second question is what the appropriate equalization rate should be. Mr. DeVries testified that the category for "Farm, Woodland, and Miscellaneous" properties was the most appropriate one to apply, and that it is reasonable to conclude that Addison properties are listed at approximately 100% of their fair market value. That "Farm, Woodland & Miscellaneous" category is listed at a ratio of 105.59% in the 2001 report. See Exhibit 7, p. 7.14. However, the individual calculation for the "Farm" category of the 2001 report is based entirely on two farm sales, and the study therefore finds the ratio for that category (113.30) to be statistically invalid. See Exhibit 7, p. 7.10. There is no separate listing for Woodlands at all, presumably because there were no such sales in the relevant period. Nor is any explanation offered as to what "Miscellaneous" properties include. Thus, the court concludes that the combined 2001 category value for "Farm, Woodland and Miscellaneous," with a ratio of 105.59%, is not adequately supported as appropriate for the land at issue here.

The Vermont Supreme Court has stated that when there are not comparable properties to the ones at issue for pur-

poses of equalization, the court must look to other evidence to determine the equalization rate. See Knollwood.Building Condominiums, 166 Vt. at 539 (noting that where there is not a statistically representative sample of properties of the same class, it is appropriate to "use evidence of other classes"); Vermont Electric Power Co. Inc., 158 Vt. at 373 (noting that it is error to compare a single comparable property). One accepted approach is to apply the ratio applicable across the board to all properties in the town. Id. (where a "statistically representative sample of comparable property" is unavailable, court may use "average of the equalization ratios for all properties in the town."). Knollwood Building Condominiums, 166 Vt. at 539-45. The court concludes that this is all appropriate approach here because no other categories are applicable to the properties at issue.

For the 2001 study, the town-wide ratio is 93.02 %. See Exhibit 7, p. 7.2. Thus, the court applies a ratio of 93.02 percent in this case. Thus, applying the 93.02 % ratio to the fair market values' determined above, the court values the properties as follows:

Parcel 1: 93.02% of $408,000 = $379,521
Parcel 2: 93.02% of $122,500 = $113,949
Parcel 3: 93.02% of $ 96,000 = $ 89,299

The statute directs that once the court determines the equalized value, the court "shall set [the] property in the list" at that value. 32 V. S .A. § 4467. The court will so order

Order

The court directs that the properties be listed on the Grand List of the Town as follows:

Parcel 1, $379,521; Parcel 2, $113,949; Parcel 3, $89,299.

Dated at Middlebury, Vermont this 29th day of April, 2003.

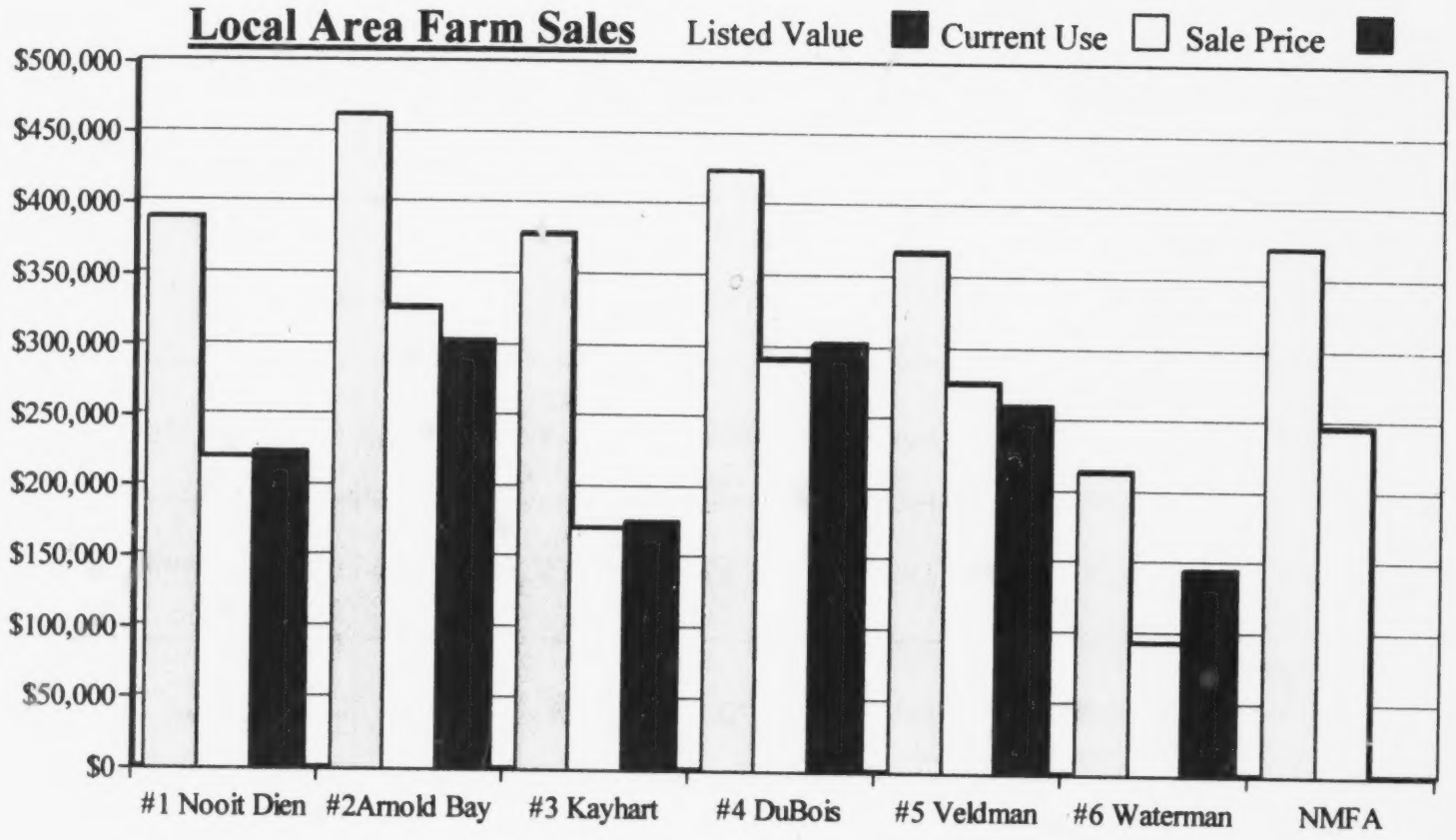
"s/ Helen M. Toor"
Helen M. Toor
Presiding Judge

"s/ Wayne Heath"
Wayne Heath
Assistant Judge

Local Area Farm Sales

	#1 Nooit Dien	#2 Arnold Bay	#3 Kayhart	#4 DuBois	#5 Veldman	#6 Waterman	NMFA (Subject Property)
Listed Value	$389,700	$462,600	$378,700	$424,200	$367,800	$214,200	$372,700
Current Use	$220,063	$326,002	$171,253	$291,687	$275,674	$93,857	$246,500
Sales Price	$223,600	$302,500	$175,000	$302,500	$260,000	$145,000	

Sale Price is more closely related to the Current Use Value than to the Listed Value. Sale #4, the only property where "development rights" were sold to the Vermont Land Trust, demonstrates no reduction in the value of property being "protected."


Local Area Farm Sales
Listed Value
Current Use
Sale Price
$500,000
$450,000
$400,000
$350,000
$300,000
$250,000
$200,000
$150,000
$100,000
$50,000
$0
#1 Nooit Dien
#2Arnold Bay
#3 Kayhart
#4 DuBois
#5 Veldman
#6 Waterman
NMFA

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF VERMONT

Mark A. Boivin

vs.

Town of Addison Board of Civil Authority

Supreme Court Docket No, 2003-236
Docket No. 194-9-00
Docket No. 195-9-00
Docket No. 190-9-00

Appellant's Brief

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Statement of the Facts:

The Properties: The subject is a modest farm away from the main roads. There are three properties under appeal in a consolidated case.

Parcel one is the home farm with one dwelling built in 1887, numerous farm buildings dating back over a century, a 20 year old freestall barn, and 289 acres of farmland. The farm is located on a class three dirt road in the western part of Addison. This parcel is owned by Mark A. Boivin and Paul A. Boivin D/B/A No-Mon-Ne Farms Assoc. (Taxpayers).

Parcel two is 97.7 acres of land which is owned by the Taxpayers as Mark A. Boivin and Paul A. Boivin JTWROS. (Taxpayers). It has about 78 acres tillable.

Parcel three is owned by Mark A. Boivin and Paul A. Boivin D/B/A No-Mon-Ne Farms Assoc. (Taxpayers) and consists of 80 acres of cropland with 76 tillable. It is located on a class two paved road three miles from the other parcels.

The Case: The essence of this case is the fair market value of a farm. Facial comparison of this farm with other farms that have sold in Addison clearly shows that the subject properties are over assessed. A simple facial comparison of the list prices of six farm and their sale prices unmistakably proves the over assessment. *See,* PC, pg. 28. The fact is, if the Taxpayers could only have sold their properties for the appraised values ($408,000; $122,500; & $96,000), they could have bought three whole farms that were sold in Addison complete with dwellings and barns (Ramsey - 438 acres for $223,600; Blacklock - 278 acres for $175,000; Gevry – 124 acres for $145,000). This would have increased their land base from 467 acres in three separate parcels to 840 acres in four parcels and still have left $82,900 unspent.

While the Taxpayer's parcel one is now assessed at $379,521, the farm most comparable to it (River to Veldman) sold for $275,000 including barn equipment. Another farm (Gevry to DuBois) with comparable dwelling, barns, with 351 acres in two non-contiguous parcels, with equipment, sold for $312,500.

The Town assesses another farm (Corriea Farm), which is 707 acres (244% the size of parcel one) with, new barns, and modern dwelling, at $475,000 or only 125% of parcel one's assessment.[11] *See,* PC, pg. 74.

These circumstances highlight the absurdity of raising

[11] Please note that every time this farm purchased more land the assessment went down. Even though the Town Quit-claimed its school property to the Corriea's, the 45 acre "lease land" continued to be listed as tax exempt. *See,* PC, pg. 74.

the assessment on the subject properties. This appeal follows.

Synopsis of the testimony:

The Taxpayer presented 6 farm sales as comparables *See,* PC, pg. 31-33.

Adjustments were made for the presence of non-realty items *See,* PC, pg. 34

Using the equalization procedures of the Vt. Department of Taxes, the listed values of the properties were shown to be at 155.37% of their sale prices with a ±30.5 confidence interval. *See,* PC, pg. 33-36; Vtape 1/22/03 14:20

Next the sales were standardized using the land extraction method. The assessed values of the improvements were deducted from the sale prices to obtain the residual contributory value of the land. This value was attributed to the subject land and the assessed values of the subjects' improvements were added to obtain the standardized market value of the subject parcels. *See,* PC, pg. 37-38.

The Vt. Current use value was next compared to the sales. This proved that the Current use value was 101.3% of the sale prices with a ±4.6% confidence interval. *See,* PC, pg. 40-43

The cost method used a comparison of the sales of open land and land with farm buildings to determine the value of both the land base and the farm buildings. These values were used as adjustments to the comparable sales to obtain the subjects' fair market values. *See,* PC, pg. 44-53.

The results were statistically tested using the same "student 't'" method that the State uses in it equalization study. High and low values along with calculations of the 90% confidence intervals were provided for each parcel. *See,* PC, pg. 29-30. Averages were provided as a central value.. All sales

in Addison between 1996 and 2000 were considered in this study

Issue One: Whether the Addison Superior Court erred its treatment of non-realty property included in the comparable sales. Specifically, whether 32 V.S.A. § 4041 requires the lister/appraiser to inspect, inventory, and value the items that are not real estate.

Decision: "Specifically, he [Mr. Boivin] rejected the value listed in the property transfer tax returns and subtracted thousands of dollars from those values based upon his own valuation of equipment, feed, etc. The court does not find it reasonable to reject valuations placed upon property in the property transfer tax returns. Although it is true the parties the sale may have motives to value the real estate higher or lower than its actual value, the buyer and seller have opposing positions with regard to whether a higher or lower value is desirable, and they are required to accurately list the value on the returns. Thus the court is unwilling to accept plaintiffs' revaluations.[5]" [Footnote] " [5]Moreover, 'the fact that personal property is difficult to appraise fully and fairly is notorious both nationally... and in Vermont...' Knollwood Building Condominiums v. Town of

Rutland, 166 Vt. 529, 537 (1997)(citations omitted)" *See* Ruling on Tax Appeals, Pg. 11-12

Argument:

There is no dispute that the Town of Addison does not tax personal property; the Grand list is composed of only real estate. Both business and personal property are exempted from taxation in Addison.

Likewise there is no dispute that all of the sales presented, by both the Town and by the Taxpayer, included items of non-realty property as defined in 32 V.S.A. §3802 and in PVR Rule 82-1. *See* also Property Valuation And Review, Vermont Listers Handbook, page 56

The sales proffered by the Taxpayer included stored feed, planted crops, bulk tanks, vacuum pumps, milking systems with milking machines, farm supplies and hand tools, equipment such as silo unloaders, portable fans and gutter cleaners.

The sales used by Mr. DeVries included not only all of the items listed above but also tractors, wheeled loaders, mowers, choppers, registered vehicles, mixer wagons, cattle both mature and youngstock, and purchased concentrate feed (grain). Mr. DeVries also testified that he did not inspect or value the non-realty property, but relied solely upon the property transfer tax return.

The Taxpayer is the only one that, not only provided the property transfer tax returns, but also inspected, inventoried, and valued the non-realty items. Taxpayer points out in his exhibit the reasons and authorities for inspecting, valuing, and adjusting the sales prices for the presence of non-realty property. *See,* PC, pg. 54. No question was made by the Town of the competency of the Taxpayer to value the non-realty items; he has been a farmer since 1958; who buys, uses,

sells, and trades these items. Neither were the amounts of the adjustments, impeached at trial.

His inspection included talking to the principal parties of the sales, and to persons that subsequently purchased some of the equipment that was later resold.

The decision criticizes the Taxpayer for "subtracting thousands of dollars" from the sale price. Only Taxpayer's farm sale one, Ramsey to Nooit Dein, had a value listed for personal property on the property transfer tax return ($28,300

penned in by hand). All the other sales had no value listed even though non-realty item were evident. By contrast his adjustments in the other sales ranged from $10,000 to

Taxpayers' Comparables	Gross Sale Price	Sale Adjustment (Dollars / % of Gross)
From property Transfer tax returns		
Sale One	$251,900	$28,300 / (11.2%)
Calculated adjustments		
Sale Two	$317,500	$15,000 / (4.7%)
Sale Three	$185,000	$10,000 / (5.4%)
Sale Four	$312,500	$10,000 / (3.2%)
Sale Five	$275,000	$15,000 / (5.5%)
Sale Six	$155,000	$10,000 / (6.4%)

15,000, which he described as very conservative values. The table below shows adjustments as percentages of the sale price.

The Almy Report discusses sale price adjustments.[12]

> "Current procedure allow for adjustments for personal property. No guidelines for making such adjustment are in evidence, except for an instruction to automatically deduct 10 percent from the reported price of a mobile home if the furnishings were sold. Unless adequate sales exist, we recommend that

[12] The firm of Almy, Gloudemans, Jacobs & Denne, a firm of property taxation and assessment consultants, was commissioned by the Vermont Department of Taxes, Division of Property Valuation and Review in 1998 to study the property taxation and equalization procedures in this state.

adjustments be made for personal property included in sales, although transactions for which the amounts appear extreme (say, more than 5 percent for residential property and more than 25 percent for commercial property) should continue to be automatically excluded." Almy, Gloudemans, Jacobs & Denne, Study of Equalization Procedures, Vermont Department of Taxes, Property Valuation and Review Division (July 1999) pg.70.

Using the above and the Nooit Dein sale as guidelines, the adjustments made by the Taxpayer are very conservative.

The question here is whether there is a legal basis for this action.

The Superior Court points to Knollwood (supra) and uses the same argument employed by the Town of Rutland and disallowed by this court in that same case. Knollwood states just prior to the section quoted in this decision being appealed:

"In its argument, the Town highlights the difficulty, if not impossibility, of properly valuing personal property, and the likelihood that the self-reporting system understates the value of the property. We understand the Town to be suggesting that its system, with all its imperfections, should be considered close enough. This argument should be made to the Legislature. The current statutory scheme clearly imposes on the listers the obligation to determine the fair market value of all property, real and personal, and to 'make such personal examination of the property which they are required to appraise as will enable them to appraise it at its fair market value.' Id.(32 V.S.A.)§ 4041." Knollwood Building Condominiums v. Town of Rutland, 166 Vt. 529, 537 (1997) (Emphasis added)

The issue of self-reporting is further addressed in Knollwood. It states:

> "As set out above, the statute clearly places the burden of a "personal examination" on the listers, a requirement inconsistent with total reliance on self-reported values. *See* Id

The evidence is clear. There is non-realty property included in the sales. The property transfer tax returns are wrong. The decision of the court to rely solely upon the erroneous values reported on these returns is a clear error of law.

The decision claims that Mr. DeVries followed the Uniform Standards of Professional Appraisal Practice (USPAP). *See* Ruling, Pg. 5. USPAP is the national

wide standard of practice for the appraisal industry and has been adopted by Vermont. (26 V.S.A. chapter 69) Two of the rules applicable here are:

"Standards Rule 1-2 (This Standards Rule contains binding requirements from which departure is not permitted)…

(e) identify the characteristics of the property that are relevant to the purpose and intended use of the appraisal, including:

a. its location and physical, legal and economic attributes;
b. the real property interest to be valued;
c. any personal property, trade fixtures, or intangible items that are not real property but are included in the appraisal."

"Standards Rule 1-4(g)

An appraiser must analyze the effect on value of any personal property, trade fixtures, or intangible items that are not real property but are included in the appraisal."

Comment: Competency in personal property appraisal (see STANDARD 7) or business valuation (see STANDARD 9) may be necessary to allocate the overall value to the property components. A separate valuation developed in compliance with the Standard pertinent to the type of property involved, is required when the value of a nonrealty item or combination of such items is significant to the overall value."

These rules are the same as the court's ruling in Knollwood (supra). It is patently evident that it is a violation of the rules of USPAP for a professional appraiser to merely accept the valuations of the sale parties without doing his own appraisal. The rule is clear, Mr. DeVries had the obligation to inspect, inventory, and value the non-realty property. His failure to do so is a violation of law. The court's finding that he followed USPAP is an error of law.

In summary, the decision to exclude the comparable sales proffered by the Taxpayer because he followed the requirements of 32 V.S.A. § 4041, and to accept Mr. DeVries' appraisal when he did not, is a manifest abuse of discretion, and a clear misapprehension of the law. "However, when a finding of fact is

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unsupported by any evidence, it must be set aside." Bookstaver v. Town of Westminster, 131 Vt. 133; 300 A.2d 891; (1973).

Issue Two: Whether the Addison Superior Court erred by excluding from consideration the Taxpayer's equalization studies.

Decision: "Mr. Boivin did his own ratio analysis based on farm sales in Addison from 1996 through 2000. *See* Exhibit 101, Ratio Study. Contrary to the State Tax De-

partment conclusions he concluded that the ratio of listed price to sale price for such sales has actually been 155.37%. This was based upon two sales in 1996, one in 1997, two in 1998 and one in 2000. *See* id., Market Value Analysis-Sale Comparison Grid. Thus, it used different time periods for analysis than the state calculations. In addition, Mr. Boivin used "adjusted" sales prices for the properties based upon his own calculations of value of the real estate versus personal property, as opposed to using the actual reported sales prices from the property transfer tax returns." *See* Ruling on Tax Appeals, pg. 9

Argument:

The rule on what may be used in equity studies is best stated in Philbin.

> "As the court stated in McKnight Shopping Center, Inc. v. Board of Property Assessment, 417 Pa. 234, 241-42, 209 A.2d 389, 393 (1965), "In considering whether or not a particular assessment is lacking in uniformity, however, a property owner, the taxing authority and the courts may rely on any relevant evidence." Philbin v. Town of St. George, 156 Vt. 640; 588 A.2d 1060; 1991, also Bowen v. Town of Burke, 153, Vt. 131,569 A.2d 452, (1989) & Knollwood (supra)."

Likewise the proffered comparables and equalizations cannot be arbitrarily excluded.

> "In calculating an equalization ratio, the set of comparables used for initial valuation will generally suffice to meet the constitutional mandate of fairness embedded in 32 V.S.A. § 4467. See Kachadorian v. Town of Woodstock, 144 Vt. 348, 351, 477 A.2d

965, 967 (1984). But where additional evidence of comparables is presented, and the additional properties are generally comparable to the subject property -- even though they may not have been appropriate as comparables for determining initial valuation and therefore were not selected for that purpose by the Board -- the Board cannot arbitrarily exclude the additional comparables when computing an equalization ratio." Couse v. Town of Leicester, 156 Vt. 570; 593 A.2d 473; (1991) See also Philbin (supra)

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"As a matter of law, a property which is not unique requires the application of the comparable property's equalization ratio to determine its proper listed value." Kachadorian v. Town of Woodstock, 144 Vt. 348, 351, 477 A.2d 965, 967 (1984)

If a statistically sound equalization study is available then it must be used.

"The second step is dependent on whether comparable properties exist within the town. If comparable properties do exist, then a comparison must be made between their current market value and their listed value. Kachadorian at 351, 477 A.2d at 967. This comparison will yield the equalization ratio which must be applied to the fair market value of the subject property to determine its listed value. Village of Morrisville Water & Light Department v. Town of Hyde Park, 134 Vt. 325, 330, 360 A.2d 882, 885 (1976). ...

"Finally, we think it desirable to point out that the Board apparently misinterpreted our 1984 opinion in this case. We did not direct the Board, on remand, to apply any specific equalization ratio. Rather, for the sake of the Board, we reiterated the general rule that when the subject property is found by the Board to be unique,

the common ratio for all properties within the town is to be applied. However, when comparable properties exist, as here, the ratio derived from the comparables is to be applied." Kachadorian, 149 Vt. 446; 545 A.2d 509; (1988)

With regard to the use of all relevant sales over a 5 year time period, there is no statute or rule limiting the time frame for such studies. The Almy Report (supra) addresses this issue on page ES6 paragraph 7 where it states:

"7. The Sales Period Should Be Expanded

Current equalization studies generally employ two years of sales prior to the assessment date (April1) of the study year. District advisors can expand the period six months in either direction to help achieve larger samples, but seldom do because of the tight time frame to complete the studies. Given the nature of Vermont's small towns with insufficient sales, we recommend that the time frame be extended to a standard period of three years, with the allowance for still more years (up to five per the IAAO *Standard on Ratio Studies*). Having sufficient sales is critical to the equalization process and using the same sales in several studies carries the additional benefits in terms of year to year stability...." *See,* Almy, (Supra).pg. ES 6.

The issue of adequate sample sizes has also been addressed by this court.

"In theory, his Court could address the small and unrepresentative sample problem by requiring evidence on every comparable property or a statistically representative sample. n3 In practice, the evidence is unavailable. While our precedents talk about the difference between the listed value and fair market

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value of comparable properties, the concept of compara-

ble properties is applicable only where there is a sale of the properties involved. In smaller communities, there may be few or no sales of comparable properties. This paucity of comparative data ensures an unrepresentative sample, or no comparison at all." Bowen (supra). (Emphasis added)

It is clear that the Taxpayer's equalization studies are consistent with the rules above. It is an abuse of discretion not to apply them.

The Taxpayer did two ratio studies, one with the Town of Addison's Grand List and a second with the State of Vermont's Current Use Value. For both studies he considered all the farm sales since the town-wide reappraisal in 1996 per Bowen (supra). He used all sales that were not excluded under the guidelines in the Property Valuation And Review, Vermont Listers Handbook, page 31.

Because the community had sufficient number of sales the Taxpayer was able to obtain a statistically representative sample by using all the relevant sales per Bowen (Supra). The study proved that the Town's listed values were not only 155.37% of sale prices but also that they had a 90% confidence interval of ±30.5%. The listed values did not meet the requirements of the state for either accuracy or of uniformity. *See,* PC, pg. 34-35.

By comparison these same sales proved that the other public appraisal, the current use appraisal done by the State of Vermont, is highly accurate and uniform. This comparison proved that the Current Use Value appraisal had an aggregate ratio of 101.67% and a confidence interval of ±4.6%. *See,* PC, pg. 40.

The presentation of five years of data only provides the court with more information to base its decision upon. By examining the individual sale ratios over the period it is evident that there is no trend in a change of value. The Taxpayer testified

that because of the consistency of the sales data the court could use any three of the sales and obtain substantially the same result. VTape. [13]

In contrast the Mr. Devries uses data over 10 years old in his appraisal and a cost schedule over 25 years old, which will be discussed later in this brief.

The issue of adjusting the sale prices for the presence of non-realty items was settled above. It is necessary to point out that the Town is not injured by their use here. The adjustments only decrease the ratio more into the Town's favor. In addition the PVR requires exclusion from the equalization study of "Sales that include personal property unless the amount can be determined and deducted." (Emphasis added) See Listers Handbook. Pg. 31

Conclusion:

Addison is a farm town. The subject properties are not unique. These farms sales are comparable to the subject. This equalization study proves that the listed values for farms in the Town of Addison greatly exceed their fair market values. The law is clear; when comparable properties exist, as here, the ratio derived from the comparables is to be applied Kachadorian, 149 Vt. 446; 545 A.2d 509; (1988). & at 351, 477 A.2d at 967.

A court may not list a taxpayer's property higher than fair market value, even if comparable properties are listed above fair market value. Ames v. Town of Danby, 136 Vt. 78, 80, 385 A.2d 1075, 1077-78 (1978); Brown v. Town of Windsor,139 Vt. 129; 422 A.2d 1268; (1980); Gionet v. Town of Goshen, 152 Vt. 451; 566 A.2d 1349; (1989).

[13] No videotape reference is available because before 1/22/03; 11:13 there is no video portion on the tape, just a blue screen.

The facts are clear; the law is clear; the duty of is clear. Instead of raising the subjects' listed values, the court must lower them.

Issue Three: Whether the Addison Superior Court erred by excluding from consideration evidence based upon the income approach solely because the Town's witness says that this approach is not normally used for farms?

Decision:

"...(Mr. DeVries stated) Farms are not generally evaluated based upon the Income Approach." *See* Ruling on Tax Appeals, Pg. 5

"He (Taxpayer) also used a method not accepted for valuing operating dairy farms – the Discounted Cash Flow Analysis." *See* id. Pg. 7

"The court found Mr. DeVries criticisms of Mr. Boivin's valuation methods to be legitimate and rejects Mr. Boivin's calculations of fair market value for all of those reasons." *See* Id, pg.12

Rule:

In addition to the rules stated previously in the section on equalizations the following apply:

"The touchstone for property tax valuations is fair market value, as mandated in 32 V.S.A. § 3481. Royal Parke Corp. v. Town of Essex, 145 Vt. 376, 378, 488 A.2d 766, 767-68 (1985). While the most persuasive method of appraising residential property in Vermont is to establish fair market value through bona fide sale transactions, id. at 378-79, 488 A.2d at 768, our statute does not prescribe the method nor limit the manner in which evidence of fair market value may be presented to the Board. See Re Montpelier & Barre R.R., 135 Vt. 102, 105, 369 A.2d 1379, 1381 (1977)." Sonder-

geld v. Town of Hubbardton, 150 Vt. 565, 567-68, 556 A.2d 64, 66 (1988). (Emphasis added)

"As the court stated in McKnight Shopping Center, Inc. v. Board of Property Assessment, 417 Pa. 234, 241-42, 209 A.2d 389, 393 (1965), "[i]n considering whether or not a particular assessment is lacking in uniformity, however, a property owner, the taxing authority and the courts may rely on any relevant evidence." Philbin, (Supra)

"We have long held that administrative agency actions are deemed presumptively correct. Department of Taxes v. Tri-State Indus. Laundries, Inc., 138 Vt. 292, 294, 415 A.2d 216, 218 (1980); In re Young, 134 Vt. 569, 570,

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367 A.2d 665, 666 (1976); International Ass'n of Firefighters Local #2287 v. City of Montpelier, 133 Vt. 175, 178, 332 A.2d 795, 797 (1975). And where warranted by the evidence, an administrative board's findings are conclusively binding on this Court. In re Agency of Admin., State Buildings Div., 141 Vt. 68, 74, 444 A.2d 1349, 1352 (1982); see Ladeau v. Department of Employment Sec., 134 Vt. 387, 359 A.2d 648 (1976); St. Francis v. Department of Social Welfare, 134 Vt. 344, 360 A.2d 94 (1976); see also Kittery Elec. Light Co. v. Assessors of Town of Kittery, 219 A.2d 728, 744 (Me. 1966); Pantasote Co., 100 N.J. at 412, 495 A.2d at 1310." Sondergeld (Supra)

Argument:

The Taxpayer submitted the State of Vermont Current Use Appraisal as the income approach to fair market value. *See,* PC, pg. 39-43.

The Current Use Value is developed by the State of Vermont using the discounted cash flow method using data from the Farm Credit Service, a federally chartered financial institution serving the agricultural industry. The State's values must be deemed presumptively correct because it "...is a record, report or data compilation of a public agency setting forth its factual findings pursuant to authority granted by law." Knollwood, (Supra) at 166. Likewise the method it uses to test appraisals in its equalization studies must also be the correct method of determining the accuracy of an appraisal method. See Sondergeld (Supra).

The Current Use Value, as published by the Department of Taxes, was compared to the same farm sales that were used to test the Town's Grand List. Using the State's equalization procedure, the Current Use model proved to have an aggregate ratio of current use value to sale price of 101.67% with a 90% confidence interval of ± 4.6% and a Coefficient of Dispersion of 3.85%. By comparison the State requires that the 90% confidence interval only be within ±10% for the appraisal under study to be valid.

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This is the mathematically accurate and statistically valid sample referred to in Bowen (Supra). In addition the value is updated annually; is based upon data objectively determined by a third party; is based upon the largest possible sample size, and thus is as accurate as possible; and the values do not vary from case to case. See Bowen (Supra).

The applicability of this model to local markets is proven by this test with actual sales in the neighborhood. Taxpayer testified that the current use value could be used in the same manner as the Gross Income Multiplier to determine the fair market value of a property. Vtape 1/22/03 15:01

No evidence or testimony questioned the accuracy of this appraisal.

The law is clear. Any reasonable evidence is admissible. The official products of a state agency are deemed presump-

tively correct. The evidence clearly shows that these values, produced by the Vt. Dept. of Taxes, are correct. Accordingly these values are conclusively binding on the court. *See* Sondergeld, id.

32 V.S.A. § 4467 requires findings of fact and law.

> "The court below as trier of the facts was bound to impartially and judicially weigh and sift the evidence in arriving at the facts established by the evidence and pertinent to the issues involved. Some evidence, because it was not only critically relevant, but also was uncontroverted and of undeniable credibility, required recognition in findings as a matter of law. See Montgomery v. Branon, 127 Vt. 83, 86, 238 A.2d 650 (1968), and cases there cited." Bookstaver (Supra)

The court, as trier of fact, weighing, sifting, and sorting the evidence, has the right to reject the conclusion of testimony. While an outright rejection of testimony may be an abuse of discretion, the outright rejection of and refusal to consider proffered evidence, especially that developed by a State agency as required by

law, is error of law. Findings are required. To exclude this evidence of value solely on recitation of Mr. DeVries' testimony is arbitrary, not a finding of fact and an error of law. *See*, Corrette v. Town of St. Johnsbury, 140 Vt. 315; 437 A2d 1112; (1981).

The exclusion of evidence and failure to issue findings are reversible errors.

Issue Four: Whether the Addison Superior Court erred by finding that the Town's Appraisal met the requirements of law and followed Uniform Standards of Professional Appraisal Practice (USPAP) solely upon the claims of the Appraiser

Decision:

"In performing appraisals he (Mr. DeVries) uses the Uniform Standards of Professional Appraisal Practice published by the Appraisal Foundation, and methodologies or the Appraisal Institute set forth in he text The Appraisal of Real Estate." Ruling on Tax Appeals, Pg. 5

Argument:

The issue of inspection, inventorying, and valuing non-realty items has already been discussed above. Although it applies here we will not revisit that issue here. There are several other errors of practice that do not meet the requirements of law.

1. **Circular reasoning.**

In grade school we were all taught the check our arithmetic. For example if the assignment was to subtract 35 from 87 we would get 52. To prove that our math was correct we would then add 52 to 35 to see if we again got 87. All this procedure "proves" is that our arithmetic was correct. It does not "prove" that any of the values used are right. All that is needed for circular reasoning is a preconceived initial value ("87" above). The second number can be any randomly generated value. Circular reasoning does not prove anything. It is a non sequitur.

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Nevertheless, Mr. DeVries uses this process to calculate the adjustments to sales. *See* Defendant Exhibit 8, Pg. 30. The "Subject land value allocation" [A], minus the "Sale land value allocation" [B], equals the "Sale adjustment" [C]; which is later added back to the same sale to "prove" his original value. In short "A" minus "B" equals "C"; "C" plus "B" equals "A". *See* Vtape 1/23/03 14:44

This is not the first time that this court has seen this "method." It was used by Mr. Kermit Blaisdell, in his appraisal of the same properties in Mark A. Boivin v. Town of Addison, Vermont Supreme Court Docket, No. 98-495; on appeal from Addison Superior Court, Docket Nos. 290-11-96

Ancv, 288-11-96 Ancv, 289-11-96 Ancv. In its decision the Addison Superior Court found fault with this method:

"... Appellant has introduced evidence which has caused the Court to question the weigh that should be given to the testimony of Kermit Blaisdell, the appraiser hired by the Town. In his testimony, Mr. Blaisdell sought to support his appraisal of the subject property by means of the Direct Sales Comparison Approach. In analyzing the sales of properties comparable to the appellant's, Mr. Blaisdell made the precise adjustment to the sales prices that were necessary to align them perfectly with is estimates of the subject parcels. Aside from the desirability of attaining alignment, he offered no objective method for the Court to assess the reasonableness of his adjustments. The testimony was unconvincing because of the circular logic used by Mr. Blaisdell to arrive at his figures." Law of the case – unpublished.

This court was also unconvinced by this method when it occurred in Beach Properties, Inc. v. Town of Ferrisburg, 161 Vt. 368; 640 A.2d 50 (1994).

"... But the methodology used to calculate the capitalization rate in this case was so flawed that it rendered the taxpayer's evidence on this point meaningless."

The use of circular reasoning is a clear mathematical error.

"Where the board of appraisers, on appeal from town's valuation of property, admitted appraisal report of town's expert, which included a clear mathematical error, and there was no other credible evidence supporting his conclusion, the board's reliance upon the erroneous fair market value figure of the expert

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in determining the appraised value of the property constituted error." 32 V.S.A. § 4467. See Corrette, (Supra)

This methodology also violates the USPAP Standards Rule 1-1 (development) as well as the ethics rule; "An appraiser must not communicate assignment results in a misleading or fraudulent manner. ...

The acceptance of and reliance upon this appraisal by the court is a reversible error of both fact and law.

2. Valuing Buildings Solely on a Cost Basis

Mr. DeVries appraised the farm buildings on a cost per square foot basis by doubling the values in the 1980 Vermont State Appraisal Manual. See Defendant's Exhibit 8, Page 19. This valuation was not developed from, tied to, nor tested by any reference to actual sales.

The rule:

> "In the assessment of taxpayers' real property, use of a land-value table was permissible under the tax statute. While the problem with the use of land-value tables is the potential for arbitrary valuations, where the table is based on appropriate sales data, this problem is mitigated." Scott Construction Inc. v. City of Newport 165, Vt. 232;683 A.2d 382 (1996)

Mr. DeVries testimony clearly shows that Scott is not appropriate here because there was no reference to sales. Rather, the rule that applies is:

> "We held in Demers v. City of Montpelier, 120 Vt. 380, 389, 141 A.2d 676 (1958), that cost and value are not necessarily the same. And if it appears that the cost basis was the producing cause or the sole basis of the appraisal, it was error and without foundation in law. In re Heath, ..."(128 Vt. (519; 266 A.2d 812; (1970)). Bookstaver (Supra)

USPAP requires that the cost method of appraisal use actual sales data not untested tables, and is the same requirement as above. It states:

"(An appraiser must) analyze such comparable data as are available to estimate the difference between the cost new and the present worth of the improvements (accrued depreciation)." USPAP, Standards Rule 1-4(b)(iii) Acceptance of an "appraisal" that is base solely upon 25 year old data and adjusted by 200% without any supporting sales comparisons is an error of law.

Likewise Mr. DeVries' Land Base Valuation is not based upon any analysis, just a list of sales and a finished value. See Defendant's Exhibit 8, Page 17-18.

The decision states:

> "...he assigned value the various elements of the comparable sales, such as the number of tillable acres, the number of acres of pasture, the number of acres of woodland, the type, ... availability of utility services, road frontage and views." See Ruling on Tax Appeals, Pg. 6; PC pg. 18.

Nevertheless neither a list of these attributes, nor their contributory values, nor the calculations leading to these values was presented. For example, there is no derivation of the "Site" value from the land sales, yet it is there on page 18 being added to the other estimates. See, Defendant's Exhibit 8, Page 8. The only logical conclusion available is that no such analysis was ever done, as required by USPAP. USPAP states that:

> "The appraiser must analyze the effect on value, if any, of the assemblage of the various estates or component parts of a property and refrain from valuing the whole solely by adding together the individual values of the various estates or component parts.
>
> Comment: Although the value of the whole may be equal to the sum of the separate estates or parts, it also may be greater than or less than the sum of such estates or parts. Therefore, the value of the whole must be tested by reference to appropriate data and supported by an appropriate analysis of such data.

A similar procedure must be followed when the value of the whole has been established and the appraiser seeks to value a part. The value of any such part must be tested by reference to appropriate data and supported by appropriate analysis of such data." USPAP,(Supra), Standards Rule 1-4(e).

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Even so, on page 18 he sums his estimate of the various parts. The probability of error is compounded by the fact that each of the component parts was estimated using different methodologies.

The standard of law is the same:

"[A]ttempting to equalize the results of two inherently different appraisal methods would produce an irrational, and inherently unfair, result." Grand Union Co. v. City of Winooski. 152 Vt. 193,195.

Summing the results of different appraisal methods is especially irrational and inherently unfair.

3. Adjustment of Leases for Atypical Financing:

Mr. DeVries describes how his comparable sale number 5 was based upon a two-year lease with the lease payments being credited to the purchase price. [14] *See* Exhibit, Defendant's Exhibit #8, Sale #5.

UAPAP states:

"if the opinion of value is to based on non-market financing of financing with unusual conditions of incentives, the terms of such financing must be clearly identified and the appraiser's opinion of their contributions to or negative influence on value must be de-

[14] No page numbers are on the appraisal update dated August 22, 2002. For reference purposes the copy of this sale's actual "Farm Lease and Option to Purchase," in the Appellant's Printed Case on pages P.C. 75-83. That agreement has an allocation of purchase price that includes values for non-realty items ignored by Mr. DeVries in his appraisal. It also values the dwelling at $128,000 not $90,000. *See,* PC, pg. 77.

veloped by analysis of relevant market data;" *See* Standards Rule 1-2(c)(iv)

"When, developing an opinion of the value of a leased fee estate or household estate, an appraiser must analyze the effect on value, if any, of the terms and conditions of the lease(s)." *See* Standards Rule 1-4(d).

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In this sale either the sale price must be reduced by the lease payments / value of the rent, or credit must be given for the interest free financing and taxes paid by the lessor during the period covered by the lease. Mr. DeVries does neither.

Without a doubt Mr. DeVries' appraisal does not follow USPAP and the finding that he did, has no basis in fact or law. "However, when a finding of fact is unsupported by any evidence, it must be set aside. Eurich v. Coffee Rich, Inc., 130 Vt. 537, 298 A.2d 846 (1972)." Bookstaver, (Supra). Accordingly this finding of the court must be set aside.

Issue Five: Whether the Addison Superior Court erred by not considering the effect of sales chasing by the Town on the State of Vermont, Department of Taxes, division of Property Valuation and Review equalization study.

Decision:

No findings:

Argument:

The Taxpayer testified that the State Equalization Study presented by the Town to the court was tainted by "sales chasing." Vtape 1/22/03; 15:31.

Neither testimony nor evidence was presented in opposition to this fact.

Sales chasing violates the integrity of the State Tax Department's equalization study. The result is that the equalization studies presented to the court are completely

zation studies presented to the court are completely unreliable indicators of value and of uniformity in tax assessments.

The equalization study is the method that the state uses to test the grand list of each community. By comparing the listed values to selling prices of properties as

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they are sold, the state determines whether the listed values meet the constitutional and statutory requirements.

Sales chasing is basically the old issue of spot appraisals; reappraising or adjusting the listed values of some properties that have sold while not reappraising any of the other properties that are in the same class. The Almy report (Supra) best explains the issue as follows:

> "6. Sales Chasing Must be Quashed
>
> Some Vermont listers engage in illegal "sales chasing." Which is the practice of reassessing properties that have sold at or near the sale price while not reassessing surrounding or comparable properties. If an assessment change is made following a sale and that assessment is used in the equalization study, the determination of equalized education property value and the calculation of the coefficient of dispersion can be seriously distorted. Municipalities in which sales chasing is practiced can receive an unjust share of school aid at the expense of towns who assess all properties fairly and uniformly, regardless of whether they sold. Thus, procedures must be put in place to prevent sales chasing. PVR must be vigilant in testing for sales chasing and take measures to exclude or adjust any sales ratios contaminated by this unprofessional practice. One solution is to use the assessed values form the previous year (for example, for the 2000 study, use the assessed values as of 1 April 1999 instead of the 1 April 2000 assessments)."

Sales chasing also results in non-uniform assessment between properties and conceals the fact that the Grand List does not meet legal requirements.

Sales chasing takes two forms. The first is by changing the listed values of some sales that were singled out for inclusion in the equalization study. The second is by ignoring or excluding sales that did not have a selling price near the listed value. The Town of Addison does both.

The Taxpayer proffered six farm sales. Of these sales only one (Gevry to Dubois Farms Inc.) was included in the equalization study. This farm sold on May 15, 2000 for $312,500. The property transfer tax return for this sale showed the listed

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value was $525,400 on May 17, 2000, as attested to by the assistant town clerk. *See,* PC, pg. 64. Between the time of sale and inclusion in the equalization study this property had its assessment reduced by 30% or $157,000. This sale is shown in the state's equalization study at $368,400. *See* Defendants Exhibit # 7. This is prima facie sales chasing. *See* Vtape 1/22/03; 15:31.

In the equalization study there is one other farm, the Vanier to Dubois Farms Inc.[15] The property transfer tax return proves that this property is "part of a larger parcel," as attested to by the assistant town clerk. *See,* PC, pg. 72

The PVR rule states that, "Sales of property conveying only part of the parcel, such as a lot or lots sold off from a farm." should be excluded from the study because there is no listed value at the time of the sale. *See* Listers Handbook, (Supra), pg. 31

Nevertheless this property is appraised after the sale and listed on the equalization study at a value of $206,600. *See* Defendants Exhibit # 7.

---

[15] Both sales listed in the Equalization Study were sales to DuBois Farms Inc.

None of the other farm sales proffered were included in the study. All are still being listed at values considerably higher than their respective sale price. Sale number five (Rivers to Veldman) is an example. The property transfer tax return proves that the listed value of this property was $367,800 at the time of sale and that it sold for $275,000 (including equipment, see above Pg #). A silo was removed in 2000 and the assessment was reduced to $365,400. *See,* PC, pg. 65-67. Mr. DeVries testified that this sale is a valid arms-length transaction. *See* Vtape 1/23/03 @ 14:52. This sale qualified for the study but was not included.

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In any event, there is no justification for changing the assessments after the sale. These manipulations invalidate the study results. Changing the listed values after a sale is like changing the numbers on a lottery ticket after the drawing.

The underlying issue here is one of tax appraisal uniformity. There is no justification for taxing some farms for more than their fair market value while lowering the assessments on a chosen few.

The rule is simple:

> "The proportional contribution clause [of the Vermont Constitution, Ch. I, Art. IX] requires that property in a town be assessed at a uniform rate." Heindel v. Town of Grafton, 140 Vt. 147 (1981)

> "Property in a town must be appraised at a uniform rate." Kruse v. Town of Westford, 145 Vt. 368 (1985). [I]t is of more urgency to examine the uniformity of the appraisals and the equitability of them on a comparative value basis than it is to test them for precision with respect to market value." International Paper Co. v. Town of Winhall, 133 Vt. 147,149 (1981).

"The proportional contribution clause of this article [Vermont Constitution, Ch. I, Art. IX] does not mean that a town may not reassess certain properties; however, it does prohibit a town from reassessing property if the effect is a departure from a uniform rate." Heindel (Supra).

"We do not believe our decision is undercut by the United States Supreme Court's opinion in Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336, 109 S. Ct. 633 (1989), a case decided after this case was briefed and argued in this Court. In Allegheny Pittsburgh Coal Co., the Court found a violation of equal protection requirements where the taxing authority valued the plaintiff's property on the basis of its purchase price but made only minor modifications in the assessments of lands which had not been recently sold. The system produced gross disparities between the values assigned to lands recently sold and those assigned to otherwise comparable surrounding lands." Alexander v. Town of Barton, 152 Vt. 148 (1989) at 159-160.

"The law requires that the methods of taxation must operate equally upon all of the inhabitants. See Chapter I, Article 9, Vermont Constitution; Fourteenth Amendment to the United States Constitution; Clark v. Burlington, 101 Vt. 391, 143 A. 677 (1928); In re Hickok's Est., 78 Vt. 259, 62 A.2d 724 (1906). This law applies equally to the evaluation of property for tax purposes. Furthermore, it is also required by 32 V.S.A. § 4601 that "Taxes shall be uniformly assessed on

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the lists of the persons taxed, unless otherwise provided by law." One vital purpose of 32 V.S.A. § 4467 is to grant to an aggrieved taxpayer the opportunity to establish such uniformity as it relates to his property.

Here, the evidence clearly established a decided lack of uniformity between the appraisal of other taxpayer's land and that of the plaintiff. This resulted in an unfair and discriminant appraisal of plaintiff's land." Book-staver (Supra)

Clearly sales chasing is arbitrary and violates the principle of uniformity. The fact that the Town of Addison engages in sales chasing definitively proves that the grand list is based upon spot appraisals and upon the roll of the dice, rather than any standard or uniform methodology. There would be no need to sales chase if the listed values in the Town conformed to the requirements of law and the constitutions.

Issue Six: Whether the court erred by raising the assessments of parcels two and three without sufficient evidence.

Decision:

"The court therefore finds the fair market values are as follows: Parcel 1, $408,000; Parcel 2, $122,500; Parcel 3, $96,000." *See,* PC, pg. 24.

"The court directs that the properties be listed on the Grand List of the Town as follows: Parcel 1, $379,521; Parcel 2, $113,949; Parcel 3, $89,299." *See,* PC, pg. 27

Argument:

Mr. DeVries presented six sales to justify his appraisal of these parcels. All of the comparable sales presented were for values less than the listed values of the subject parcels. *See* Defendant's Exhibit 8, pp. 34, 35, 38, & 39

Chart of sale prices presented by Mr. DeVries:

Sale #2	Sale #6	Sale #4	Sale #5	Sale #6	Sale #3
12/15/95	1/4/96	2/9/00	5/27/00	8/30/00	11/15/00
$1,000 / a	$1,000 / a	$988 / a	$900 / a	$986 / a	$886 / a

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Mr. DeVries added adjustments to each of these sales. None of the adjustments were derived from actual sales; all were based upon his opinion. *See*, USPAP, Standards Rule 1-4(a). One of the adjustments was because he stated that land values were appreciating. As is apparent in the above chart instead of increasing, there is a slight decrease in the value of land during the five years covered.

Chart of subject parcels:

.	Parcel Two	Parcel Three
Listed Value (2000)	$106,300	$88,700
Listed Value (2000) / acre	$1088	$1109
DeVries Appraisal	$122,500	$96,000
DeVries Value / acre	$1250	$1200

The application of his formulas results in the illogical effect that the subject parcels are valued at 125% and 120%, respectively, of the highest comparable sale presented.

Mr. DeVries presented another land base formula that he used for parcel one. Applying that formula ($900 / a for tillable land and $450 / acre for non-tillable land) to these parcels, we get the following values.

Parcel Two	Parcel Three
$79,200	$69,750

The results of these formulas are manifestly selfcontradictory. Clearly there is no evidentiary support for either the current assessment or for any increase in the listed value. This example justifies this court's distain of formula based appraisals.

Nevertheless the court accepts Mr. DeVries' values for parcel two at $1250 per acre for a total of $122,500. Parcel three is valued at $1200 per acre for a total of $96,000.

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The Rule is:

> "In this case, finding 31 that the valuation of plaintiff's property corresponds with other comparable properties in the appellee town is completely without any evidentiary support. The only evidence of comparable property values are those far less than the valuation placed on the plaintiff's property by the listers. As this finding must be set aside, there appears no finding, nor can any be inferred because of the absence of any evidentiary support, that the listed value of plaintiff's land corresponded to the listed value of comparable properties in the same town." *See*, Bookstaver (Supra)

Because there are no sales presented that are for more than the listed value of the subject parcels the rule established in Bookstaver (Supra) clearly applies. This finding be set aside for lack of evidence.

Issue Seven: Whether the Addison Superior Court erred by applying a pre-qualifying test as a prerequisite for Taxpayer's testimony being credible.

Decision:

"He is not trained and licensed as an appraiser and did not use accepted appraisal methods. He mixed listed values with sales values..." *See* Ruling on Tax Appeals, Pg. 11; PC, pg. 23 .

"Similarly, the court does not accept Mr. Boivin's choice of comparable properties, as he did not use standard methods in selecting or comparing them to the parcels at issue. He used parcels that were not operating farms, and ones without the more modern free-stall barn and milking parlor on Parcel 1." *See* Ruling on Tax Appeals, Pg. 12; PC, pg. 24 .

Argument:

The right to testify and be heard is plain, specific and plenary. It originates in the Vermont Constitution Chapter One, Article 4th. [Remedy at law secured to all]. There can be no requirement of licensure.

With regard to the use of "accepted appraisal methods" the rule is clear.

"... our statute does not prescribe the method nor limit the manner in which evidence of fair market value may be presented to the Board." See Re

Montpelier & Barre R.R., 135 Vt. 102, 105, 369 A.2d 1379, 1381 (1977)". Sondergeld (Supra) (Emphasis added)

Likewise PVR Rule 84-1 §18 states:

> "The board (appraiser) shall allow the introduction of any relevant evidence which is commonly relied upon by reasonably prudent people in the conduct of their affairs..."

This is the same rule in other jurisdictions.

"(Appellant) attacks the probative value of this testimony on the grounds that it was not based on any accepted method of valuation, but this overlooks the fact that the opinion testimony of a landowner as to the value of his land is admissible without further qualification." United States v. 329.73 Acres of Land, 666 F.2d 281, 284 (5th Cir. 1982) as quoted in LaCombe v. A-T-O, 679 F.2d 431 (1982).

Thus it is patently unambiguous a taxpayer has the right to present any pertinent information without being required to be a "licensed appraiser" or limited to the use of "accepted appraisal met

In the subject case, while the taxpayer was allowed to testify, his testimony was given no weight because, "He is not trained or licensed as an appraiser, and did not use accepted appraisal methods." *See* Ruling, PC, pg. 23

To the Taxpayer there is no difference between not admitting his testimony and summarily excluding it from consideration for not meeting a qualifying test. Both are prejudicial errors. See Bookstaver, (Supra).

As justification for excluding the Taxpayers' analysis, the decision cites Mr. DeVries assertion that it is an error of procedure for the Taxpayer to use the Town's listed values in his analysis. This is the same claim as was used by the City of Winooski and dismissed by this court.

"Taxpayer may. However, rely in part on the evidence put forward by the City, and there is no restriction on the method or manner of showing fair market value. See Sondergeld v. Town of Hubbardton, 150 Vt. 565, 567

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A.2d 64, 66 (1988)" ... "[Taxpayer] ...was not required to introduce a wholly independent appraisal. It could, and did, rely on the City's evidence for much of the calculation of fair market value. See in re Quechee Lakes Corp., 154 Vt. 543, 553-54, 580 A.2d 957, 963 (1990)." Woolen

Mills Assoc. v. City of Winooski, 162 Vt. 461; 648 A.2d 860; (1994).

The Town entered its listed values into evidence. The listed value is the sum of the individual assessments for the dwelling, site, farm buildings, and the land base. The Taxpayer is free to use the component assessments to standardize the comparable sales to arrive at the market value of his properties. The Town was not disadvantaged by the use of these values. It was free to argue that its own valuation was incorrect. It did not. The market value analysis is only another method of equalizing sales prices of comparables to the subject parcels.

The exclusion from consideration of this analysis is arbitrary. No findings were made, just a recitation of Mr. DeVries' testimony. Findings on the evidence are required and failure to do so is an error of law. *See* Corrette (Supra).

The decision also looks in askance at the evidence of "super-adequacy

The Taxpayer argues that because the three parcels must be valued individually, the barns on parcel one are too large for that parcel. A reduction in the values of the barns is required because the values of farm buildings are proportional to the land base. Sales of farmsteads without a supporting land base proved the relationship of barn value to land base. The fact that the value of barns is related to the ability of the land to support its capacity in animals was settled in Farr v. State Highway Board, 122 Vt. 156; 166 A.2d 187; (1960). *See* Vtape 1/22/03 13:46 – 13:59.

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Notably, Mr. DeVries uses "excessive size and obsolescence" [super-adequacy] as justification for lowering the value of the dwelling in the Reynolds sale, and does so without question by the court. *See,* PC, pg. 75.

The decision also accepts Mr. DeVries claims that the Taxpayers' comparables are not valid because they are not

going concerns and do not have milking parlors. The decision condemns the Taxpayer because, "He used parcels that were not operating farms, and ones without the more modern free-stall barn and milking parlor on Parcel 1." *See,* Ruling, Id. The court ignores the fact that the property transfer tax returns for all of the Taxpayers' comparable sales list the sales as "operating farm" to "operating farm".

Nevertheless, the court accepts Mr. DeVries' use of the Reynolds sale without question, even though this farm does not have a milking parlor and has not been in operation for ten years, having been leased to the purchaser during that period. *See,* PC, pg. 75 . This sale Mr. DeVries' invalidates criticism of both the Taxpayers' comparables and his use of "superadequacy".

Unreserved acceptance of this sale by the court impeaches its criticism of the Taxpayers comparable sales and procedures.

The dichotomy of the court's treatment of Mr. DeVries and its treatment of the Taxpayer unmistakably demonstrates that the decision is based, not upon the evidence presented, rather it is based solely upon licensure of Mr. DeVries.

The rule governing the value of expert testimony is:

> "Generally, an expert's opinion is of no greater probative value than the soundness of his reasons given therefor will warrant. State v. Critzer, 230 Md. 286, 186 A.2d 586 (1962); Surkovich v. Doub, 258 Md. 263, 265 A.2d 447(1970)." As quoted in Allen v. Burlington Housing Authority 129 Vt. 8; 270 A.2d 588; (1970).

Licensure does not confer the attributes of infallibility and omniscience. Mr. DeVries' appraisal is rife with errors and is inconsistent with the law and USPAP. It warrants no probative value.

The evidence is unambiguous. Even cursory facial examination of the facts proves that these properties are over-

assessed. *See,* PC, pg. 28. Raising the assessments in face of these facts is absurdity.

The facts do not support the findings. Recitation of testimony substitutes for key findings. The decision is based exclusively upon the premise that an appraiser, by virtue of licensure, is always correct. This is prejudicial error. The wholesale and uncritical acceptance of Mr. DeVries' appraisal, without even the slightest notation of the numerous errors of fact and of law, is proof of prejudicial error.

The proper remedy is for this court to reverse and remand for a new trial.

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Dated at Addison, Vermont, this 5th day of August, 2003

"s/ Mark A. Boivin"
Mark A. Boivin

cc: Donald R. Powers, Esq.

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SUPREME COURT U.S.
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MAR 25 2004
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(2)

No.03-1257

In The

Supreme Court of the United States

Mark Boivin, – Petitioner

v.

Town of Addison – Respondent

ON PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Vermont

BRIEF IN SUPPORT OF

PETITION FOR WRIT OF CERTIORARI

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions:

The Fifth Amendment to the United States Constitution provides in relevant part: "[N]or shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

The Constitution of the State of Vermont

Chapter I., A Declaration of the Rights of the Inhabitants of the State of Vermont.

Article 2. [Private property subject to public use; owner to be paid]

That private property ought to be subservient to public uses when necessity requires it, nevertheless, whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money.

Article 4. [Remedy at law secured to all]

Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which one may receive in person, property or character; every person ought to obtain right and justice, freely, and without being obliged to purchase it; completely and without any denial; promptly and without delay; comformably to the laws.

Article 9. [Citizens' rights and duties in the state; bearing arms; taxation]

That every member of society hath a right to be protected in the enjoyment of life, liberty, and property, and therefore is bound to contribute the member's proportion towards the expence of that protection, and yield personal service, when necessary, or an equivalent thereto, but no part of any person's property can be justly taken, or applied to public uses, without the person's own consent, or that of the Representative Body, nor can any person who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if such person will pay such equivalent; nor are the people bound by any law but such as they have in like manner assented to, for their common good: and previous to any law being made to raise a tax, the purpose for which it is to be raised ought to appear evident to the Legislature to be of more service to community than the money would be if not collected.

Statutory Provisions:

32 V.S.A. § 3802 (2003). Property tax

The following property shall be exempt from taxation:

(8) Household furniture and equipment of every person not regularly used as income producing property; household provisions; personal wearing apparel and ornament; private and professional libraries; shrubs and plants located in a commercial greenhouse or nursery; fowl; sheep; cattle; horses; goats; swine; bees; hay and produce sufficient to winter out the stock; tractors and other machinery of a farmer, not used for hire or contract purposes; real and personal farm property constructed and used for the storage of manure and designed to avoid water pollution; tools and implements of a mechanic or farmer; aircraft, automobiles and motor vehicles, but not including trailer coaches; and motorized highway-building equipment and road-making appliances as defined in section 4(19) and (31) of Title 23 required to be registered as motor vehicles;

INTRODUCTION

The decision of the Supreme Court of the State of Vermont should not be allowed to stand, because if it is allowed to stand, it would place preconditions upon fundamental Constitutional rights.

The purpose of the Constitution is stated in the preamble:

> "We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and to secure the blessings of liberty to ourselves and to our posterity, do ordain and establish this Constitution for the United States of America."

Justice is established, and the blessings of liberty are secured by constitutional mandates of equal protection, compensation for property taken, and due process of law. These rights of the people are both a limit on the state to prevent the incursion and arbitrary application of the law and a mandatory obligation of the State to implement these protections. These rights are absolute and cannot be preconditioned.

The Vermont Supreme Court ignores the requirements of the Constitution. It places preconditions upon rights guaranteed by the Constitution while ignoring the necessities of uniformity and equity in taxation. It turns a blind eye to the issue of the State taking of private property through discriminatory taxation.

THE STANDARD OF LAW GOVERNING TAX APPEALS

The standard of law that applies to tax appeals in Vermont is:

> "... The appraiser or court shall take into account the requirements of law as to valuation, and the provisions of Chapter I, Article 9 of the Constitution of Vermont and the 14th Amendment to the Constitution of the United States...." 32 V.S.A. § 4467 (Emphasis added)

This legislation explicitly establishes the jurisdiction of the decisions of this Court over tax appraisals within the State of Vermont.

REASONS FOR GRANTING THE WRIT

First is the issue of the inclusion of personal property in the tax assessment. It is undisputed that items of personality are included in every sale presented to the trial court. It is also undisputed that the property tax applies only to the real estate. See 32 V.S.A. § 3802 (8) (2003) The Vermont Supreme Court states that no error occurred because, "Nothing in the statute requires the town, or its appraiser, to inspect each comparable property for items of personality..." This pre-conditions and evades the requirements of equal protection, uniformity and equity. All other properties in town are being assessed only upon the real estate. Inclusion of non-realty items in the subject assessments is a violation of the 14th Amendment.

In the words of the International Association of Assessing Officers (IAAO)

6.5 Adjustments to Sales Prices

Sales prices in ratio studies may need to be adjusted for financing, assumed leases, personal property, and date of sale. This is especially true for nonresidential properties. The real property tax is based on the market value of real property alone as of a specific date. This value may not be the same as investment value (that is, the monetary value of a property to a particular investor) and does not include the value of personal property or financing arrangements. Thus, failure to make required adjustments for these factors gives unsatisfactory estimates of market value for the real estate." Standards on Ratio Studies, Approved July 1999, International Association of Assessing Officers. (Emphasis added)

The extent of error in the estimation of the fair market value is best shown by simple facial comparison.

The fact is, if the Taxpayers could only have sold their properties for the appraised values ($408,000; $122,500; & $96,000), they could have bought three whole farms that were sold in Addison complete with dwellings and barns (Ramsey - 438 acres for $223,600; Blacklock - 278 acres for $175,000; Gevry – 124 acres for $145,000). This would have increased their land base from 467 acres in three separate parcels, to 840 acres in four parcels, and they still would have $82,900 left unspent.

Given the gross discrepancy between the assessments and the sales of neighboring properties raising the assessments of the subject parcels by the court is ludicrous.

When the Vermont Supreme Court points out that the val-

ues presented by the Petitioner for parcels two and three are lower than the values in 1990 and 1996, it errs on two points. First the "1996 value" is the Town's assessed value that is being appealed. Secondly the value presented by the Petitioner for parcel two is only 3% less than the 1987 purchase price and is well within the 90% confidence range of ± 4.7%. In addition the Town's own appraiser had testified that the values of land in Addison had declined between 1990 and 2000. Likewise the Vermont Supreme Court ignores the wide variance between the values presented by the Town's appraiser. See Petition for a Writ of Certiorari, pages 93, 94.

Secondly, the Vermont Supreme Court ruled that the exclusion of the Petitioner's ratio study from consideration did not affect his "substantial rights." This ruling ignores the fact that neighboring farms are being assessed at over 155% of the fair market while residences are being assessed at only 91% of value. The fact that the petitioner is being assessed for more than 100% of the fair market value of his property is a violation of his "substantial rights." This differential in assessments is an unequivocal violation of the equal protection clause.

Thirdly the Vermont Supreme Court ruling on the Discounted Cash Flow (DCF) analysis is a classic example of George Orwell's 1984 "New Speak." The Vermont Supreme Court entry order states that DCF is computed by the State of Vermont **to assess farms** under the Current Use Value (CUV) program. At the same time the Vermont Supreme Court states, "... the method is not generally used for farms." These statements are self-contradictory. They are a clear example of the twisting of logic and of the English language.

Likewise the Vermont Supreme Court's ruling that Mr. Boivin's calculations were not credible because he did not follow "accepted appraisal methods" while stating that the law does not require Mr. DeVries to adhere to The Uniform Standards of Professional Appraisal Practice (USPAP) is "New Speak" in its prime. It is a double standard and also a clear violation of the equal protection clause.

It must also be noted that while Mr. Boivin's calculations were not defined in USPAP, they did follow the Standard on Ratio Studies by the IAAO and the procedures adopted by the State of Vermont, Department of Taxes, Division of Property Valuation and Review (PVR) for its equalization studies.

On the other hand, Mr. DeVries committed numerous violations of USPAP including the use of circular reasoning, failing to adjust for personal property, even for the values he had assigned to the non-realty items during a contemporaneous appraisal of the comparable sale. He readily admitted in testimony that he had appraised the subject properties as a "going concern" and had selected his comparable sales o that basis. He also admitted that not been able to find any parcels that had sold for dollar amounts close to the values that he had assigned to the subject parcels, even though he had searched all over the whole county. Every one of Mr. DeVries' errors were ignored by both the trial court and by the Vermont Supreme Court.

The last issue is Sales Chasing.

> "Sales chasing is the practice of using the sale of a property to trigger a reappraisal of that property at of

> near the selling price. Sales Chasing causes invalid uniformity results in a sales ratio study and causes invalid appraisal level results unless similar unsold parcels are reappraised by a method that produces an appraisal level or unsold properties equal to the appraisal level of sold properties." Standards on Ratio Studies, Approved July 1999, International Association of Assessing Officers. (Emphasis added)

This Court has ruled that systematic reassessments of only properties that have sold is a violation of the 14th Amendment. See Allegheny Pittsburgh Coal v. Webster County, 488 U.S. 336 (1989)

Documentary evidence, in the form of Property Transfer Tax Returns, was provided the trial court that the Town is actively engaged in sales chasing and that only the properties that were selected for the State Equalization Study were reassessed after the sale. This is Enron accounting, cooking the books, fraud. For the court to accept and use this poisoned study is itself a violation of the law.

Nevertheless the courts turn a blind eye to the evidence. It claims that the issue was not preserved because there was no argument before the trial court. In other word, because the Town chose not to contest the uncontestable facts, the issue does not meet a precondition for consideration. This calls to mind the aphorism that, "There are none so blind as those who will not to see."

The only clear standard applied by the Vermont Supreme Court is that of credentials. While the courts systematically exclude the evidence of the Petitioner because he is "a dairy farmer and not an appraiser" it justifies its decision on the

fact that, "In this case, the court had a lengthy written appraisal supporting the values that it ultimately found, in addition to explanatory testimony from the expert who prepared the appraisal." This is a violation of the due process and equal protection provisions of the Constitution.

The Vermont Supreme Court finds that there is no problem with the fact that farms sell for the current use value and that they are assessed for more than the selling prices even thought this scheme forces farmers into the current use program with its subsequent lien on $1/5^{th}$ of the value of the property.

SUMMARY

Justice John Marshall stated that the power to tax is the power to destroy. From the evidence and the actions of the Town and the State PVR and the Vermont Supreme Court it is clear that there is a concerted attack upon private property. The State is trying to gain an interest and eventually control of the farmland in the state.

The Town is systematically over assessing the farmland within the town and engaging in unconstitutional sales chasing. The PVR knows about the over-assessments and ignores the sales chasing. The Vermont Supreme Court ignores the Constitutional requirements, applies arbitrary and unequal preconditions to the evidence, and feigns justifications to avoid the issue. Evidence of the property owner is systematically excluded, errors by the "expert" ignored and the court then rules that there is no evidence to support the taxpayer.

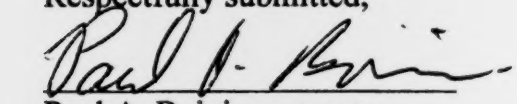
No taxpayer, whether farmer or homeowner, can be immune to such a systematic attempt to force him to forfeit his property

CONCLUSION

This Court should grant the PETITION FOR A WRIT OF CERTIORARI and directly address the issue of discriminatory tax assessment designed to compel a taxpayer to forfeit rights to his property and the willful blindness of the Supreme Court of the State of Vermont to the facts. This Court should re-establish the primacy of the Constitution and apply the protections so guaranteed.

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Paul A. Boivin – pro-se

Date: 3/25/04

(2)

Supreme Court, U.S.
FILED
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No. 03-1257

In The
Supreme Court of the United States

MARK BOIVIN,

Petitioner,

v.

TOWN OF ADDISON,

Respondent.

On Petition For A Writ Of Certiorari To The Vermont Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The petitioner claims that the Town of Addison's tax assessment of his property was unfairly inflated by "sales chasing" and other assessment errors, and that the state courts rejected his testimony as to value merely because he was not a licensed tax assessor, all in violation of his rights under the Fifth and Fourteenth Amendments.

1. Did the Vermont Supreme Court reject petitioner's claim of unconstitutional "sales chasing" on the basis of an adequate and independent state procedural ground?

2. Did the petitioner fail to present his other claims of unconstitutionally discriminatory over-taxation in the state courts?

3. Does the factual record fail to support any of petitioner's claims of unconstitutional discrimination?

4. Was the petitioner's claim that the trial court rejected his testimony on the basis of an unconstitutional pre-qualifying test of credibility either presented to the state courts or established as a matter of fact?

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JURISDICTION

The unpublished opinion of the Vermont Supreme Court (Pet. App. A) was handed down on December 4, 2003. The petition for a writ of certiorari was filed March 1, 2004, within ninety days. The petitioner subsequently filed a document entitled Brief in Support of Petition for Writ of Certiorari, dated March 25, 2004. This later filing is expressly prohibited by this Court's Rule 14.2 ("No separate brief in support of a petition for a writ of certiorari may be filed") and respondent asks that it not be filed, circulated nor considered.

Because the federal questions urged by petitioner were neither presented to the state courts nor passed on by them, this Court lacks jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

32 Vt. Stat. Ann. § 4467: Determination of Appeal

> Upon appeal to the director or the court, the appraiser or court shall proceed de novo and determine the correct valuation of the property as promptly as practicable and to determine a homestead value if a homestead has been declared with respect to the property for the year in which the appeal is taken. The appraiser or court shall take into account the requirements of law as to valuation, and the provisions of Chapter I, Article 9 of the Constitution of Vermont and the 14th Amendment to the Constitution of the United States. If the appraiser or court finds that the listed value of the property subject to appeal

does not correspond to the listed value of comparable properties within the town, the appraiser or court shall set said property in the list at a corresponding value. The findings and determinations of the appraiser shall be made in writing and shall be available to the appellant. If the appeal is taken to the director, the appraiser shall inspect the property prior to making a determination.

28 U.S.C. § 1257(a): State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

* * *

STATEMENT OF THE CASE

This is a tax dispute, focusing on the assessment of three parcels of farm property located in the Town of Addison, Vermont ("the Town"), a rural community with a population of about 1,400. In lieu of a comprehensive statement of the case, respondent adopts and incorporates by reference the Addison Superior Court's extensive Findings of Fact, Pet. App. B, pp. 41-49, and the Vermont

Supreme Court's summary of the facts and prior proceedings, Pet. App. A., pp.31-33. *See* R. Stern & E. Gressman, *Supreme Court Practice* 390 (6th ed. 1986).

The petition, in its Statement of the Case and elsewhere, omits critical procedural facts and misstates the case in a number of respects.

1.

The petition omits any indication of when or how the federal questions sought to be raised were presented to the state courts, and how the state courts passed on them, as required by Rule 14.1(g)(i), beyond an assertion that his argument to the Vermont Supreme Court "cit[ed] . . . numerous violations of equal protection and due process." Pet. 15.

The petitioner's Fourteenth Amendment equal protection claims, and his claim that the Town's assessment operated to take his property without just compensation in violation of the Fifth Amendment, cite three perceived defects in the assessment process: an assertion that the valuation of his property was unconstitutionally inflated by "sales chasing"; a claim that the Town's assessor violated equal protection by not subtracting the value of personal property involved in recent real estate sales used for comparison purposes; and an argument that the failure to evaluate the subject property according to its projected profitability – its current use value – also contributed to an unconstitutional discrimination and constituted a "taking" without just compensation in violation of the Fifth Amendment. *See* the first of petitioner's two Questions Presented, Pet. I, and the first section of his Argument, Pet. 17-22. None of these claims was presented to

the trial court. With the exception of the sales-chasing claim, none was presented to the Vermont Supreme Court.

Sales Chasing. The term "sales chasing" refers to the practice of reassessing real property to reflect recent sale prices of comparable property, without simultaneously reassessing all other property of the same class. Petitioner presented this aspect of his discrimination claim, at least implicitly, to the Vermont Supreme Court, in an extended quotation from that court's opinion in *Bookstaver v. Town of Windsor*, 131 Vt. 133 (1973). Pet. App. C, at pp. 90-92. But the Vermont Court held that the claim had been waived and declined to pass on it:

> Aside from Boivin's comment at trial that he believed Addison was engaged in "sales chasing," the issue was neither the subject of evidence nor argument before the trial court. Thus, we agree with Addison that the issue was not preserved for appeal, and we decline to address it.

Pet. App. A., pp. 37-38. Respondent argues below that the decision as to sales chasing rests on an adequate and independent state procedural ground.

Inclusion of Personal Property. In his brief to the Vermont Supreme Court petitioner complained that the Town's assessor had included personal property in his valuation of comparable farm property which had recently been sold, arguing that this practice violated a state statute; provisions of the Vermont Listers Handbook, the Vermont Supreme Court's decision in *Knollwood v. Town of Rutland*, 166 Vt. 529 (1997) (regarding the statutory duty to determine fair market value) and the Uniform Standards of Professional Appraisal Practice. Pet. App. C, pp.67-72. At no point did he argue that the practice, either

by itself or in combination with other perceived flaws in the Town's assessment, violated any federal right, or discriminated against him, or against any particular class of property-owners.

Current Use Valuation. The same is true of petitioner's claim that the Town violated his federal rights by not assessing his property according to its current use value. Vermont farm and forest property may be assessed by two different methods. Under the Current Use Program, 32 V.S.A. ch. 124 property which meets certain criteria is taxed according to its profitability, defined as "the price per acre which the land would command if it were required to remain henceforth in agriculture or forest use. . . ." Farms not enrolled in the program are taxed, like other real estate, according to assessed market value. The Current Use Program is fully voluntary and qualified owners may opt in or not. Once enrolled in the program, however, removal of the property incurs a penalty of 20% of the market value. 32 V.S.A. § 3751.

REASONS FOR DENYING CERTIORARI

I.

Petitioner's Constitutional Claims Were Procedurally Defaulted in the State Courts

The Claims of Discriminatory Tax Assessment

Two of petitioner's claims regarding the assessment of his property – the alleged failure to subtract the value of personal property from the sale prices of comparable property, and the failure to assess his property according to its "current use" value – were never argued to the state

courts as federal constitutional violations. As such, they are not proper subjects for certiorari, and the Court lacks jurisdiction under 28 U.S.C. § 1257(a) to consider them. As the Court wrote in *Cardinale v. Louisiana*, 394 U.S. 437, 438-439 (1969),

> It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In *Crowell v. Randell*, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee*, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20, § 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. "If both of these do not appear on the record, the appellate jurisdiction fails." 10 Pet. 368, 391.
>
> * * *
>
> In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U.S.C. § 1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, *O'Connor v.*

> *Ohio*, 385 U.S. 92 (1966), they should be given the first opportunity to consider them.

The Court's later opinions do not deviate one iota from this position. *See Illinois v. Gates*, 459 U.S. 1028, 1030 (1982); *Webb v. Webb*, 451 U.S. 493, 498-502 (1981). *Compare Baldwin v. Reese*, No. 02-964 (March 2, 2004); *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (per curiam); and *Picard v. Connor*, 404 U.S. 270, 275 (1971), affirming and applying a similar "fair presentation" requirement in habeas corpus petitions by state prisoners.

In *Baldwin* the Court recently held that a habeas petitioner had not "fairly presented" a federal question to the state appellate court when he alleged in his petition that he had been denied effective assistance of appellate counsel in the state courts, but failed to assert a violation of federal law. This case is *a fortiori* from *Baldwin*. With the exception of his sales-chasing argument, discussed below, petitioner's brief to the Vermont Supreme Court cited no federal law and claimed no federal constitutional violation. The Court in *Baldwin* held that it would not require state appellate courts to search the lower court record for unbriefed federal claims, and there is no more reason to do so in the context of a certiorari proceeding than in a habeas proceeding. In any case, a search of the lower court record would also have come up empty, because petitioner's federal constitutional claims were also not presented to, nor passed on by, the trial court.

The petitioner did present his "sales chasing" argument to the Vermont Supreme Court, but he had not done so in the trial court, and the Vermont Supreme Court refused to pass on it for that reason. Pet. App. A, pp. 38-39. The decision plainly rests on an adequate and independent

state procedural ground, and as such the Court lacks jurisdiction to review it.

> This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. *See, e.g., Fox Film Corp. v. Muller*, 296 U.S. 207, 210, 80 L. Ed. 158, 56 S. Ct. 183 (1935); *Klinger v. Missouri*, 80 U.S. 257, 13 Wall. 257, 263, 20 L. Ed. 635 (1872). This rule applies whether the state law ground is substantive or procedural. *See, e.g., Fox Film, supra*; *Herndon v. Georgia*, 295 U.S. 441, 79 L. Ed. 1530, 55 S. Ct. 794 (1935). In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory. *See Herb v. Pitcairn*, 324 U.S. 117, 125-126, 89 L. Ed. 789, 65 S. Ct. 459 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion").

Coleman v. Thompson, 501 U.S. 722, 729 (1991). Vermont's requirement that claims raised on appeal must first have been presented to the trial court is a long-standing, consistently applied fixture of state law, and petitioner makes no claim that it operated unfairly or capriciously in his case. *Compare Lee v. Kemna*, 534 U.S. 362 (2002).

The claim of witness "licensure"

Like his argument regarding the inclusion of personal property in the evaluation of recently-sold property, and his claim that his property should have been assessed by methods reserved for farms in the Current Use Program, petitioner's claim that the court rejected his testimony in violation of his First, Fifth and Fourteenth Amendment rights, Pet. 22, is made for the first time in his petition to this Court. Putting aside the complete lack of record support for his premise (see below), review should be denied for the reasons stated in *Cardinale v. Louisiana*, 394 U.S. at 438-439 and the recent decision in *Baldwin v. Reese*, declining review of federal claims which have not been presented to the state courts.

II.

None of Petitioner's Claims is Supported by the Factual Record

The trial judge's opinion recites the factual dispute between petitioner and Mr. DeVries, the Town's assessor, clearly and in considerable detail. Pet. App. B. pp. 41-49. Her decision to credit Mr. DeVries on most of the disputed points is similarly fully explained and fairly based, not on any presumptive test of licensure or accreditation, but on her visit to the Boivins' farm and the two days of testimony which she heard. *Id.* 51-52. Mr. Boivin "did not use accepted appraisal methods. He mixed listed values with sales values, and made adjustments to sales prices based upon theories the court does not accept." *Id.* 51. The judge also did "not accept Mr. Boivin's choice of comparable properties," which she thought were not fairly comparable, and she accordingly "reject[ed] Mr. Boivin's calculations" of

fair market value. Considering all the evidence she concluded that "the Town's assessed values have not been undercut by the plaintiff." *Id.* 51. Regarding the proper "equalization ratio" she disagreed with petitioner in part because of his recalculations of value based on his estimate of personal property involved in other sales, and also because he used a time period which was different from the state tax department's period. As authorized by state law she chose to "apply the ratio applicable across the board to all properties in the town" because the ratio applicable to farm and woodland properties had been calculated on the basis of only two sales, which she deemed "statistically invalid." The ratio she chose was in fact more favorable to petitioner than the one he proposed. *Id.* 53-54.

The Vermont Supreme Court approved all these findings as fairly supported by the evidence, and as such they are not subject to review by this Court. In the absence of extraordinary circumstances, none of which is presented by the case, "the decision of the state court upon a question of fact cannot be made the subject of inquiry here." *Grayson v. Harris*, 267 U.S. 352, 358 (1925). *Accord: Evco v. Jones*, 409 U.S. 91, 94 (1972); *Lloyd A. Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952).

In addition to being procedurally defaulted, petitioner's constitutional objections to the state courts' valuation of his property, and their treatment of his testimony, are unsupported by the factual record.

CONCLUSION

For the above-stated reasons the petition for a writ of certiorari should be denied.

Dated: April 2, 2004

Respectfully submitted,

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Supreme Court, U.S.
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No. 03-1257

In The

Supreme Court of the United States

Mark Boivin, – Petitioner

v.

Town of Addison – Respondent

ON PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Vermont

PETITIONER'S REPLY TO THE RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION(S) PRESENTED

1. Whether the Town may use differential assessments for ad valorem taxation of real property, including the reassessment ex post facto of only those properties that have sold and were chosen for inclusion in the State's tax equalization study, in order to acquire an interest in the properties of a particular class.

2. Whether the application of a pre-qualifying test of licensure to determine the credibility of the landowner and the subsequent application of a double standard of review to the evidence based upon this criteria, meet the requirements of due process and equal protection.

LIST OF PARTIES

Additional parties that do not appear in the caption of the case on the cover page are as follows:

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Vermont Supreme Court.

JURISDICTION

Federal jurisdiction over tax appeals was invoked by statute:

> "... The appraiser or court **shall** take into account the requirements of law as to valuation, and the provisions of Chapter I, Article 9 of the Constitution of Vermont **and the 14th Amendment to the Constitution of the United States** ...." 32 V.S.A. § 4467 (Emphasis added)

The Petitioner knew the statute and relied upon its plain language. "Shall" makes it mandatory, "and" mean that the requirements of the federal Constitution also apply.

The trial court cited 32 V.S.A. § 4467 in its ruling.

The Jurisdiction of this Court is invoked under 28 U.S.C. §1257(a)

Federal significance:

While on its face this case appears to be fact specific, fundamental constitutional issues of wide national importance are raised and should be settled.

DIFFERENTIAL TAXATION

Taxing jurisdictions across the whole country employ

some variation of a tax incentive e.g. for economic development, conservation, historical preservation, etc. The question here is whether these authorities have the right to not only provide the "carrot" of tax easement but also the "stick" of singling out certain persons or classes for over-assessment. Whether they can punish, through the use of excessive assessments, persons who choose not to participate. Can property owner be compelled to give up part of their property under the guise of taxation.

Both at trial and during appeal the petitioner stated that it is a violation of his rights to be forced to choose between being taxed at the far more than the fair market value of his property or to give up part of his property. Both at trial and in appeal there was intense discussion of the penalties under the current use program.

Justice Dooley acknowledged that farms sell for the current use value and that they are assessed for more. Nevertheless the Vermont Supreme Court turned a blind eye to the constitutional issues.

This is an issue that should be addressed by this Court because of its broad applicability and fundamental relevance to constitutional protections.

SALES CHASING

Statewide and national importance is acquired when only the sales that are chosen for the equalization study are reassessed.

Equalization studies are official governmental documents that are relied upon for many uses.

First they are used as a test of tax assessments to see if

they meet the constitutional requirements of uniformity and equity. They are also used for statewide taxation and for distribution of aid for education. Corrupting these studies adversely affect the rights of people across the whole state. It also impedes public policy development.

INTERSTATE BANKING AND COMMERCE AFFECTED

Nationally, interstate banking and commerce involving the real estate industry are harmed. Banks and financial institutions use the equalization studies to estimate market values and trends, particularly the instant home equity loan industry. Comparisons between tax assessments, as adjusted by the ratio studies, with bank appraisals provide a check upon the practices of appraisers. This check is important for the same reasons that Congress passed the Financial Institution Reform Recovery and Enforcement Act (FIRREA). Corruption of these studies by sales chasing undermines these legitimate functions.

Sales chasing is a widespread problem in jurisdictions across the country. While normally sales chasing affects only the rights of the persons within the taxing jurisdiction, when it corrupts the values on the state's equalization study, there are broad ramifications. Fifteen years ago this Court has ruled that this practice is a violation of the 14th Amendment. Nevertheless the Vermont Courts still turn a blind eye to it. This departure from this Court's decisions calls for the exercise of supervisory power.

The issue of sales chasing in equalization ratios is of national importance that requires the Courts direction.

PRESERVATION FOR APPEAL

UNFORESEEABLE RULING

This claim of violation of due process under the First, Fifth and Fourteenth Amendments by the trial court was raised at the first opportunity available on appeal with the Vermont Supreme Court.

The federal question regarding licensure and the application of a double standard to the evidence arose from the unforeseen act of the trial court. This unforeseen and totally unanticipated act could not be raised earlier. The appeal to the Vermont Supreme Court was the first opportunity to present the issue. The appeal to that court must therefore be considered timely. *Missouri v Gehner,* 281 U.S. 313 (1930), *Herndon v. Georgia,* 295 U.S. 441 (1935)

The federal claim is still in time and preserved for review by this Court even though the Vermont Supreme Court refused to consider it. *Brinkerhoff-Faris Co. v. Hill,* 281 U.S. 673 (1930).

LICENSE AND DOUBLE STANDARD

By education, experience, and by statute, as well as being the owner the petitioner was a competent expert witness

> "Value of property; owner as a competent witness. The owner of real or personal property shall be a competent witness to testify as to the value thereof." 12 V.S.A. § 1604

Heretofore the rule governing evidence was:

> "As the court stated in McKnight Shopping Cen-

ter, Inc. v. Board of Property Assessment, 417 Pa. 234, 241-42, 209 A.2d 389, 393 (1965), "In considering whether or not a particular assessment is lacking in uniformity, however, **a property owner, the taxing authority and the courts may rely on any relevant evidence.**" Philbin v. Town of St. George, 156 Vt. 640; 588 A.2d 1060; 1991, also Bowen v. Town of Burke, 153, Vt. 131,569 A.2d 452, (1989) & Knollwood (supra)." (Emphasis added)

The rule on expert testimony was:

"Generally, an **expert's opinion is of no greater probative value than the soundness of his reasons given therefor will warrant.** State v. Critzer, 230 Md. 286, 186 A.2d 586 (1962); Surkovich v. Doub, 258 Md. 263, 265 A.2d 447(1970)." As quoted in Allen v. Burlington Housing Authority 129 Vt. 8; 270 A.2d 588; (1970). (Emphasis added)

Nevertheless, the trial court parsed the English language and determined that the petitioner was not credible because he was not licensed and did not follow approved appraisal methodology.

Application of a double standard of review followed.

Even though the respondent's appraiser was proved to have violated Uniform Standards of Professional Appraisal Practice (USPAP); even though he used circular reasoning in which the premises of the argument feed upon the conclusion; even thought he violated ethical rules, he was deemed credible. Evidence was accepted from the appraiser on the same basis that other evidence was deemed not credible when presented by the petitioner. This is a double standard. It is

axiomatic that a double standard is not equal protection.

The result of the double standard was that all of the Petitioner evidence was deemed not credible and was not included in the record. Hence the argument that there is Petitioner's argument "...was neither the subject of evidence nor argument before the trial court." Documentary evidence of sales chasing, the property transfer tax returns; over-assessment and the current use value, see Pet. App C pp. 56, 57; and for the inclusion of personal property in the appraisal were all ignored.

CIRCULAR REASONING USED IN THE COURTS DECISION

The double standard led to yet another example of circular reasoning where the conclusion provides the premises supporting the argument.

First the petitioner's evidence was excluded because "Mr. Boivin is a dairy farmer not an appraiser." Then the court and the Town point to the lack accepted factual evidence as justification for the decision to consider him as not credible.

Appeal of the exclusion of his evidence from consideration is denied because of the lack of notation of the evidence in the decision. The error of this logic is proved by the fact that the current use values that were excluded from consideration were actually done by the State of Vermont. (Pet. App C pp. 56, 57)

The change in the standard of review for the evidence was radically different from what had been applied previously, was totally unforeseeable, and could not be anticipated. For this reason the timely appeal at the first opportunity to the Vermont Supreme Court preserved this issue for federal jurisdiction.

SUMMARY

The core of this case is that the petitioner's property is being differentially assessed on a wholly arbitrary and capricious manner at a level far more than it is worth. The right of taxation at the fair market value is predicated upon his forfeiting a fifth of the value of his property. The Vermont courts refuse to address his legitimate claims, rather they themselves violate the constitutional provisions of equal protection and due process. These actions are repugnant to the Constitution and cry out to this Court for redress.

Allowing the differential tax structure manifested here to perpetuate places all property owners at risk. Any authority that wants private property could just tax for it. For example dwellings and businesses could be taxed upon the value of their contents unless the owners give up a right of way for a new road. Appeals would be dismissed because the homeowners are not licensed professional appraisers. An aristocracy of licensed experts deemed infallible and unreproachable will have been created.

We respectively pray that this Honorable Court will defend the rights guaranteed under the Constitution.

CONCLUSION

For the reasons stated above the petition for a writ of certiorari should be granted.

Respectfully submitted,

Mark A. Boivin – pro-se

Date: April 13 2004